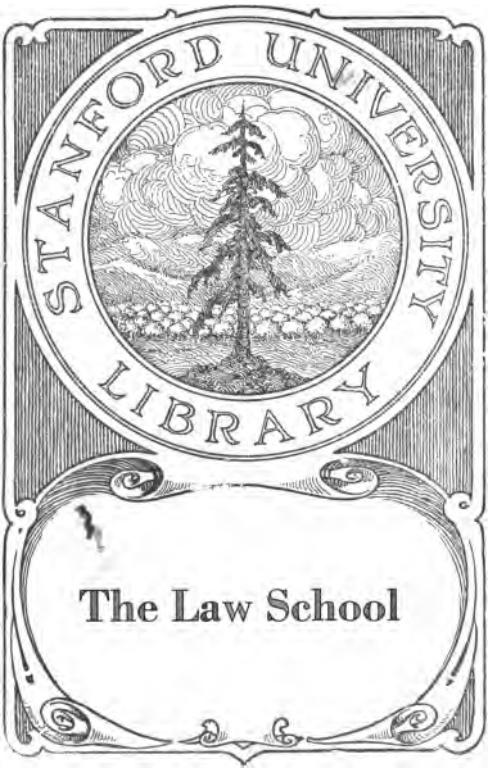

# Report

of the

# Attorney General

of the

# State of Colorado

for the

## Years 1903 and 1904

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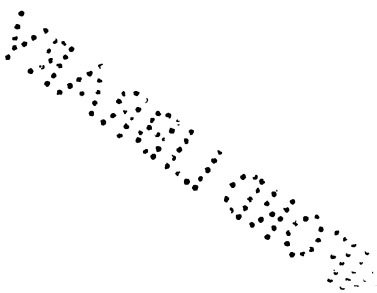
N. C. Miller
Attorney General


Denver, Colorado
The Smith-Brooks Printing Company
1904



# Biennial Report

of the

# Attorney General

of the

# State of Colorado

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To the Honorable,

JAMES H. PEABODY,

Governor of the State of Colorado.

Sir—In compliance with the constitutional and statutory requirements, I have the honor to submit the following report of my official actions, from the 13th day of January, A. D. 1903, to the 15th day of November, A. D. 1904:

This report is made up largely of opinions requested by the heads of the several departments of State.

The most important of these opinions concerned public printing, appropriations, power of the State Board of Land Commissioners, corporations and the powers of certain of the boards governing the State institutions.

During this administration of the Legal Department of State a large number of important suits have been commenced. As a result of the recommendation of previous governors, the Legislature, in 1902, passed a new revenue act. The additional revenue provided for by that measure comes from the liquor license tax, the annual state corporation license tax and the inheritance tax. These provisions of the statute were resisted and it was necessary to bring suits in order to determine their validity. The liquor license law was sustained by the Supreme Court in the case of Parsons vs. People, 76 Pac. Rep., 666. The inheritance tax was sustained in the case of Brown vs. Whitney Newton, 77 Pac. Rep., 853. The annual State corporation license

tax was sustained by the decision of the Hon. S. G. Carpenter, Judge of the District Court of the City and County of Denver, in a case entitled The People vs. American Smelting & Refining Company. The latter case was appealed to the Supreme Court and is now ready for oral argument.

Suits have been commenced to test the right to subject the railroads to this same tax. The enforcement of the statute against the railroads is opposed on the ground that they are instruments of inter-state commerce and that a tax can not be exacted from such a company for the privilege of doing business in the State. The railroad cases are pending in the Federal Court at Denver. I do not care to express an opinion on the probable outcome of these cases, as they are awaiting trial.

Generally, I feel free to say that the annual State corporation license tax has been resisted because of the manner in which it is assessed. To illustrate: The American Smelting and Refining Company is capitalized for $100,000,000. Considering the market value of the stock, about one-fifth of its property is located in the State of Colorado. The manager testifies that the works of this company can be reproduced in Colorado for $7,000,000, and this would be about one-fifth of the market value of the stock at the time of the hearing. It is contended that only the proportion of the capital invested in Colorado should be made the basis of this tax. On the other hand, it is urged that the State of Colorado has the power to say that it is unwise and inexpedient to permit immense concerns to enter the State and practically terminate all competition.

From a legal standpoint, the Legislature has the power to assess this tax upon the entire capital and to so levy it for the purpose of discouraging the entrance of such corporations in the State. The wisdom of such legislation, however, is for the Legislature to pass upon. My own opinion is that this was purely a revenue measure and was not enacted for the purpose of police regulation, and it will not be willingly complied with unless it is founded on a just basis. I think, therefore, that the act should establish the basis of the tax upon the amount of capital stock invested in the State. This may be determined from the report filed by the corporation and by giving the Auditor power to investigate and determine the proportion of the capital stock of the company invested in property in this State.

The New York law imposing a tax upon the railroads for the privilege of doing business within the State is limited strictly to the domestic business of the railroad company. The Colorado law imposing a tax upon the entire capital stock of such roads as the Atchison, Topeka & Santa Fe Railroad Company, capitalized for $250,000,000, seems manifestly unfair. The tax should be based upon the proportion of the capital stock represented by the mileage of the road within the State. I doubt, even in that case, whether the license tax would be good against an instru-

ment of inter-state commerce. All the cases which I have been able to examine on this subject have been decided against the State, except where the tax was limited strictly to the domestic business of the railroad company, and then it was not a tax upon the privilege of doing an inter-state business.

On August 29, 1892, the Pullman's Palace Car Company filed articles of incorporation in the office of the Secretary of State for the sum of $100,000. These articles show that it is a foreign corporation, organized under the laws of the State of Illinois. At the date of its filing it was incorporated for the sum of $30,000,000, and under the statute in force at that time it should have paid $3,000.00.

Since then it has increased its capital stock to $74,000,000, and our statute, at the time it commenced doing business in the State of Colorado, and at the time it designated its principal place of business in the State, required it to pay on all successive increases in its capital stock. The company has failed to do this, although requested by the Hon. Charles S. Thomas. Suit was commenced under the direction of Governor Thomas for such refusal, but the same has remained untried.

I endeavored to bring this suit to trial during the summer, but was unable to do so for reasons beyond my control. The case is now set for hearing and will be disposed of during the present month.

The defense which the company makes is that it is an instrument of inter-state commerce and that it can not be compelled to pay a fee for doing business in the State. It has paid the sum of eleven dollars to the Secretary of State for the privilege which it enjoys of having a principal place of business in the State and an agent to look after its business.

I briefed this case during the month of June, but, owing to pressure of business in court, could not get it set until the present month.

The suit brought by the State of Kansas against the State of Colorado is still pending in the United States Supreme Court. An order was entered on the 2d day of June, 1904, appointing Granville Richardson, of Roswell, New Mexico, referee for the purpose of taking testimony at any place in the United States where the same might be deemed advisable. The State of Kansas was given until the 15th of September to introduce testimony. Subsequently, the time was extended until the first of October. Evidence has been offered by Kansas at hearings which took place at Wichita, Arkansas City, Kinsley, Garden City, Pueblo and Denver. The State of Colorado has only commenced to introduce testimony. The chief witness in behalf of Colorado has been the State Engineer, the Hon. L. G. Carpenter. The Hon. J. C. Henry has also been examined on behalf of the State, for the purpose of illustrating the practical working of irrigation.

The further taking of testimony on the part of Colorado will commence on the 7th day of December, at Denver.

The probable outcome of this suit has become much more favorable to Colorado as the conditions of irrigation have been developed. I do not consider it proper to go into a discussion of the case while it is pending, and such a procedure would probably not be tolerated by the Supreme Court of the United States. It is not, however, out of place to say that the State Engineer has been giving this suit close attention and has made a thorough investigation of the waters of the Arkansas river, the underflow in the State of Kansas and the loss of the flood waters arising in Colorado. The results of this investigation show that only a very small percentage of the waters flowing into the river from the water-shed of the Arkansas pass beyond the State line. The cause of this is shown to be the formation of the river bed which allows the waters to sink. The investigation, which has been carried on under the most favorable circumstances during the past year, also discloses the fact that, irrespective of ditches, the large amount of flood waters which fall on this water-shed are lost by sinking before they reach Dodge City.

The history of the Arkansas river has also been thoroughly studied, and it is shown that the river is subject to great floods and also to remarkable scarcity of water. The literature covering the history of this stream for a number of years past shows that it was not a rare thing to find the bed of the river dry and that this condition often occurred previous to the commencement of irrigation.

The taking of testimony in this suit has been conducted personally by the Hon. C. C. Dawson, Charles D. Hayt and Platt Rogers and myself. It is not likely that the introduction of testimony will be completed before the first of April, after which probably sixty days' time will be required to close the testimony on the part of Kansas and the United States.

The several appearances which have taken place before the Supreme Court during the present term of office show that that tribunal manifests the utmost interest in the progress of this suit. Indeed, it is only natural that such concern should be exhibited, for the reason that the principles which will be laid down in the final adjudication will be the fundamental principles governing irrigation in the arid region of the United States, which comprises four-elevenths of its entire area.

It should not escape notice that the real ground of complaint on the part of the State of Kansas is the alleged damage to the underflow in the valley of the Arkansas by the diversion of the natural flow of the waters of the river in the State of Colorado, for the purposes of irrigation. We believe that the evidence introduced does not in the least sustain this complaint.

It is nowhere claimed by the State of Kansas that it has a right to the natural flow of the river for the purposes of irriga-

tion; and the people of western Kansas could no more expect to use this water for irrigation, if the contention of Kansas is sustained, than could the farmers of Colorado. The chief effort of Kansas has been to protect the natural flow of the stream from diversion, and an order made by the Supreme Court affirming the right of settlers along the stream to the natural flow would work to the disadvantage of the farmers of Kansas as well as against the farmers of Colorado. If the natural flow must pass through Colorado undiminished, then the same principle would demand that the natural flow should be unmolested in Kansas. If it is wrong to diminish the natural flow in Colorado, it is wrong to diminish the natural flow in Kansas. If it is to be decided that the natural flow can not lawfully be used for irrigation, then western Kansas has nothing to gain by this suit. Such a principle once laid down by the Supreme Court would be as injurious to the Kansas farmer as to the Colorado farmer. So that the real controversy in this suit must relate to the alleged injury to the underflow.

It is possible, in its final consideration, that the Supreme Court of the United States will hold that the Federal Courts have jurisdiction of controversies arising from the use of waters of inter-state streams for irrigation. It is not likely, however, that the court will go further, in any event, than to declare the jurisdiction of the Federal Courts to pass upon controversies of the nature set up in the bill of complaint and as to the control which the sovereign State has over the waters originating within its territory. It is possible the court may also decide as to whether the common law doctrine of riparian rights applies to the conditions prevailing in arid regions. The application of such general principles as between individuals will probably be left to the United States Circuit Courts.

From among the large number of opinions rendered by this department during the present administration, I have selected for printing those which are the most important. It is necessary that these opinions be printed during each biennial period in order to relieve the work of succeeding attorneys general, and also promote uniformity in the several departments of State. I have not selected for printing opinions pertaining to matters which have been covered by opinions of my predecessors in office.

As to financial matters, I have been largely aided by the very able opinions rendered during the administration of the Hon. D. M. Campbell—a mere reference of the department seeking advice to those opinions being all that is necessary in most cases, although in some instances it has been necessary to write an opinion upon some special feature not covered.

The opinion of this office is frequently sought to relieve the Auditor and Treasurer from difficulty occasioned by want of money to meet appropriations of the third class. The desire to continue the operation of the State institutions of the third class always induces the stretching of the law to make as much

money available for the appropriations passed for these institutions as is possible.

By far the greatest part of all the revenue coming into the State is disbursed for the maintenance of the State institutions. The appropriations are passed by the Legislature upon an estimate furnished by the Auditor and Treasurer, and when these bills are signed by the Governor it is necessary to endeavor to raise the money to meet the appropriations.

As to the size and purpose of appropriations, this office has nothing to do. It is, however, of the greatest importance that the available money be applied to continue the institutions. The appropriations of the last Legislature greatly embarrassed the Auditor and Treasurer, because those made for the maintenance of the second class institutions carried with them large sums of money for improvements and extensions.

The Legislature has, at all times, control over the classification of claims, except those of the first class. It should, therefore, separate from all appropriations for maintenance sums of money intended for improvement and extension, and the latter should be made available after all appropriations for the maintenance of the State institutions. If this rule were followed the Auditor and Treasurer would be greatly relieved and the several State institutions would be better protected.

In conclusion, I may say that more suits have been commenced during my term of office than during the terms of any of my predecessors. The character of these suits, during the past two years, has been civil rather than criminal. Grave constitutional questions have arisen. We have tried all of these cases unaided, except so far as the military suits and the Kansas-Colorado suit are concerned. With the exception of a few friendly suits commenced for the purpose of protecting the Treasurer and Auditor, all these important suits have been decided in favor of the State of Colorado.

The number of criminal cases tried and disposed of during the present administration of this office has exceeded the number of such cases tried during the terms of my predecessors.

I think I am warranted in calling attention to the number of murder cases reversed. Every one of the cases reversed during the present term has turned upon a faulty instruction. If error exists in the instructions, it is impossible to cure it in the appellate court. Observation and experience both teach that the underlying cause of mistake in instructions is the haste with which they are prepared in the trial court. This office has no part in the work. It can not even correct the error. It is not economy to hurry through a murder trial with the possibility of a reversal. The cost of re-trying the case is greater than that for the extra day consumed in a deliberate consideration of the instructions. After the witnesses are all examined and dismissed,

the only expense attending the extra day necessary for a careful consideration of the instructions is the expense of the twenty-four jurors who are in attendance upon the Court and such extra veniremen as may be called on the jury in this special case. This expense will not exceed a hundred dollars a day. At this stage of the trial, there can be no justifiable excuse for undue haste. During the past administration, four very important murder cases have been reversed for the errors spoken of, and I deem it only just and proper to call attention to the cause.

There have been written by this office, during the present administration, two hundred and fifty-six (256) opinions for the different officers, departments and institutions of the State, besides many oral opinions rendered upon request.

The correspondence of the Attorney General's office has increased to over fifteen hundred (1,500) official letters during this term.

Commodious and respectable quarters have been provided for the Attorney General's office, so each member of the force has been allowed his private room for work. I believe the organization and division of the work has largely contributed to the dispatch of business. I know of no time during the past busy term when this office has been behind in the writing of briefs and the preparation of cases for trial. In the accomplishment of this work, I am indebted to the able assistance which has been furnished me, and the fact that each one has done his part.

A tabular statement, showing the condition of the docket, and the number of civil and criminal cases disposed of, together with the opinions rendered by this office, are contained in the appendix, and made part of this report.

Respectfully submitted,

N. C. MILLER,
Attorney General.

# Appendix

## Opinions Rendered
## 1903-1904

# STATEMENT SHOWING THE CONDITION OF THE DOCKET, AND THE NUMBER OF CIVIL AND CRIMINAL CASES DISPOSED OF.

## IN THE U. S. SUPREME COURT.

| Docket No. | Title of Cause. | Briefed by | Status of Case |
|---|---|---|---|
| 10 | Kansas vs. Colorado | Attorney General Miller and Special Counsel | Pending |

## IN THE U. S. CIRCUIT COURT.

| Docket No. | Title of Cause. | Briefed by | Status of Case |
|---|---|---|---|
| 4089 | People vs. Pullman Co | Attorney General Miller | Pending |
| 4506 | People vs. C. B. & Q. Co | No brief filed | Pending |
| 4507 | People vs. U. P. R. R. Co | No brief filed | Disposed of on motion |
| 4560 | In re Sherman Parker | No brief filed | Disposed of on motion |
| 4474 | People vs. A. T. & S. F. Co | No brief filed | Disposed of on motion |
| 4475 | People vs. A. T. & S. F. Co | Attorney General Miller | Pending |
| 4604 | Portland M. G. Co. vs. Peabody | No brief filed | Disposed of on motion |
| | In re Charles H. Moyer | Att'y. Gen. Miller | Disposed of on motion |

## IN THE SUPREME COURT, STATE OF COLORADO.

### (Civil Cases.)

| Docket No. | Title of Cause. | Briefed by | Status of Case |
|---|---|---|---|
| 4535 | Long et al. vs. People | No brief filed | Defunct |
| 4593 | Crouter vs. Bennett | Former office | Pending |
| 4503 | Iron-Silver Co. vs. Mills | Mr. Melville | Disposed of on merits |
| 4595 | People vs. Sours | Former office | Disposed of on merits |
| 4636 | Malone et al. vs. Newton | No brief filed | Disposed of on motion |
| 4679 | Holmberg vs. News-Times | Mr. Hersey | Disposed of on merits |
| 4642 | Herey vs. People | No brief filed | Disposed of on motion |
| 4756 | In re Victor Poole | No brief filed | Disposed of on motion |
| 4757 | In re A. G. Paul | No brief filed | Disposed of on motion |
| 4781 | In re Estate Peter Magnes | Att'y. Gen. Miller | Disposed of on merits |
| 4805 | People ex rel. vs. Ball | Mr. Melville | Disposed of on merits |
| 4828 | In re Chas. H. Moyer | Attorney General Miller, Jno. M. Waldron, Mr. Hersey, Mr. Melville | Disposed of on merits |
| 4831 | Bell and Wells vs. People | Mr. Melville | Pending |
| 4798 | Am. S. & Ref. Co. vs. People | Attorney General Miller | Pending |
| 4840 | Glover vs. People | No brief filed | Pending |
| 4906 | People vs. District Court | By counsel | At issue |
| 4907 | People vs. District Court | By counsel | At issue |
| 30 | People vs Tool et al | By counsel | At issue |

## IN THE SUPREME COURT, STATE OF COLORADO.

### (Criminal Cases.)

| Docket No. | Title of Cause. | Briefed by | Status of Case |
|---|---|---|---|
| 4347 | Graves vs. People | Mr. Melville | Disposed of on merits |
| 4393 | Vickers vs. People | Mr. Hersey | Disposed of on merits |
| 4501 | Mahaney vs. People | Mr. Melville | Disposed of on merits |
| 4504 | Moore vs. People | Mr. Melville | Disposed of on merits |
| 4507 | Mow vs. People | Atty. Gen. Miller | Disposed of on merits |
| 4515 | Ciambelli vs. People | No brief filed | Dismissed on motion |
| 4517 | Keady vs. People | Mr. Melville | Disposed of on merits |
| 4500 | Carpenter vs. People | Atty. Gen. Miller | Disposed of on merits |
| 4539 | Buzanes vs. People | No Brief filed | Dismissed on motion |
| 4582 | Harris vs. People | Mr. Hersey | Disposed of on merits |
| 4584 | Miller vs. People | Attorney General Miller. | Disposed of on supersedeas |
| 4602 | Reese vs. People | No brief filed | Dismissed on motion |
| 4531 | Gothard vs. People | Atty. Gen. Miller | Disposed of on merits |
| 4605 | Bland vs. People | Mr. Melville | Disposed of on merits |
| 4611 | Quinn & Maroney vs. People | Atty. Gen. Miller | Disposed of on merits |
| 4626 | Peckham vs. People | Mr. Hersey | Disposed of on merits |
| 4632 | Overland Co. vs. People | Mr. Melville | Disposed of on merits |
| 4631 | Kite vs. People | Mr. Melville | Disposed of on merits |
| 4637 | Porter vs. People | Atty. Gen. Miller | Disposed of on merits |
| 4645 | Christy vs. People | Attorney General Miller. | Disposed of on supersedeas |
| 4649 | Cardonetti vs. People | Mr. Melville | Disposed of on merits |
| 4683 | Barr et al. vs. People | Mr. Hersey | Disposed of on merits |
| 4666 | Smith vs. People | Mr. Melville | Disposed of on merits |
| 4665 | Clark vs. People | Mr. Melville | Disposed of on supersedeas |
| 4671 | Langan vs. People | Mr. Melville | Disposed of on merits |
| 4690 | Rhodes et al. vs. People | Mr. Melville | Disposed of on supersedeas |
| 4732 | Lynch vs. People | Mr. Melville | At issue |
| 4738 | Bugbee vs. People | Mr. Melville | Disposed of on supersedeas |
| 4722 | Parsons vs. People | Atty. Gen. Miller and Mr. Hersey | Disposed of on merits |
| 4744 | Farlan vs. People | Mr. Hersey | Disposed of on merits |
| 4746 | La Fair vs. People | Mr. Hersey | Disposed of on merits |
| 4748 | Grundel vs. People | Mr. Melville | At issue |
| 4753 | Donaldson vs. People | Atty. Gen. Miller and Mr. Hersey | At issue |
| 4790 | Roland vs. People | Mr. Hersey and Mr. Melville | At issue |
| 4793 | Jones et al. vs. People | Mr. Hersey and Mr. Melville | At issue |
| 4791 | Bracci vs. People | Mr. Hersey | Disposed of on supersedeas |
| 4796 | Schutte vs. People | Mr. Hersey | At issue |

## IN THE SUPREME COURT, STATE OF COLORADO.

### (Criminal Cases, Continued.)

| Docket No. | Title of Cause. | Briefed by | Status of Case. |
|---|---|---|---|
| 4797 | Zipperian vs. People | Attorney General Miller and Mr. Melville | At issue |
| 4801 | Andrews vs. People | Attorney General Miller | At issue |
| 4802 | Arnold vs. People | Attorney General Miller | At issue |
| 4832 | Hubbell vs. People | Mr. Melville | Disposed of on supersedeas |
| 4835 | Molin vs. People | Mr. Melville | Disposed of on supersedeas |
| 4839 | Boles vs. People | Mr. Melville | Pending |
| 4845 | Tuttle et al. vs. People | Mr. Melville | Pending |
| 4850 | Johnson vs. People | Mr. Melville | At issue |
| 4851 | Day et al. vs. People | No briefs filed | Pending |
| 4863 | Emerich vs. People | Mr. Melville | Disposed of on supersedeas |
| 4866 | Trask vs. People | No brief filed | Pending |
| 4923 | Greenwood vs. People | No brief filed | Pending |

## COURT OF APPEALS, STATE OF COLORADO.

### (Civil Cases.)

| No. Docket | Title of Cause. | Briefed by | Status of Case. |
|---|---|---|---|
| 1810 | Lowell vs. Ins. Co | No brief filed | Disposed of on merits |
| 2786 | People vs. Johnson | Former office | At issue |
| 3178 | Van Meter vs. Bass | Mr. Melville | Pending |
| 2762 | Flor. O. & R. Co. vs. Orman | Former office | Disposed of on merits |
| 2900 | Holmberg vs. Palmer | No brief filed | Pending |
| 2760 | Gillette vs. Orman | Mr. Melville | Disposed of on merits |
| 3194 | Cleghorn vs. Impey | No brief filed | Pending |
| 3195 | Cleghorn vs. Impey | No brief filed | Pending |
| 2689 | People vs. Hebel et al | Former office | Disposed of on merits |

## COURT OF APPEALS, STATE OF COLORADO.

### (Criminal Cases.)

| Docket No. | Title of Cause. | Briefed by | Status of Case |
|---|---|---|---|
| 2631 | Fitzpatrick vs. People | No brief filed | Pending |
| 2990 | Birmingham et al. vs. People | Mr. Melville | Disposed of on merits |

## IN THE DISTRICT COURT.

### (Civil Cases.)

| Docket No. | Title of Cause. | Briefed by | Status of Case |
|---|---|---|---|
| 22398 | Cortland Bank vs. Mulnix | No brief filed | Defunct |
| 12755 | Cortland Bank vs. Mulnix | No brief filed | Defunct |
| 20844 | Brown vs. Nance | No brief filed | Defunct |
| 365 | People vs. F. & C. C. R. R. | No brief filed | Defunct |
| 998 | People vs. Fesler | No brief filed | Defunct |

## IN THE DISTRICT COURT.

### (Civil Cases, Continued.)

| Docket No. | Title of Cause. | Briefed by | Status of Case. |
|---|---|---|---|
| 33924 | O'Reilly vs. Crouter | No brief filed | Defunct |
| 33738 | People ex rel. vs. Ins. Co | No brief filed | Defunct |
| 34113 | People vs. West M. S. Co | No brief filed | Defunct |
| 34779 | Hagenberger vs. Miles | No brief filed | Defunct |
| 35279 | People vs. Gold Cup Co | No brief filed | Disposed of on merits |
| 35069 | U. S. Red. Co. vs. Crouter | Mr. Hersey | Disposed of on merits |
| 35293 | People vs. Am. S. & R. Co | Att'y. Gen. Miller | Disposed of on merits |
| 35169 | U. S. Red. Co. vs. Crouter | Mr. Hersey | Disposed of on merits |
| 35417 | Snodgrass vs. Crouter | Mr. Hersey | Disposed of on merits |
| 35500 | In re Smith vs. Cleghorn | Mr. Melville | Disposed of on merits |
| 35044 | Bass vs. Van Meter et al | Mr. Melville | Appealed |
| 35540 | New. C. L. & P. Co. vs. Peabody | No brief filed | Pending |
| 35549 | News-Times Co. vs. Holmberg | Mr. Hersey | Disposed of on merits |
| 35843 | People vs. U. P. R. R. Co | Transferred | U. S. Circuit Court |
| 35576 | Palmer vs. Holmberg | No brief filed | Appealed |
| 35851 | People vs. A. T. & S. F | Transferred | U. S. Circuit Court |
| 35841 | People vs. C. B. & Q. Co | Transferred | U. S. Circuit Court |
| 35842 | People vs. A. T. & S. F. Co | Transferred | U. S. Circuit Court |
| 1321 | People vs. Hard Land Co | No brief filed | Pending |
| 36143 | People vs. Rouse | Mr. Hersey | Disposed of on merits |
| 36195 | Cassidy vs. Rouse | Mr. Hersey | Disposed of on merits |
| 16197 | In re Impey vs. Cleghorn | Mr. Melville | Appealed |
| 16198 | In re Impey vs. Cleghorn | Mr. Melville | Appealed |
| 36418 | Bradbury vs. Holmberg | Mr. Hersey | Disposed of on merits |
| 36510 | Bennett vs. Holmberg | Mr. Hersey | Disposed of on merits |
| 1998 | Foster vs. Peabody | Teller county | Pending |
| 1999 | Mullaney vs. Peabody | Teller county | Pending |
| 2016 | Davis vs. Peabody | Teller county | Pending |
| 1321 | In re Charles H. Moyer | Ouray county | Appealed |

## IN THE COUNTY COURT, CITY AND COUNTY OF DENVER.

### (Civil Cases.)

| Docket No. | Title of Cause. | Briefed by | Status of Case |
|---|---|---|---|
| 6664 | In re Estate W. F. McClellan | Atty. Gen. Miller | Disposed of on merits |
| 6772 | In re Estate John H. Zisch | Atty. Gen. Miller | Disposed of on merits |
| 6900 | In re Estate Sam Strong | Atty. Gen. Miller | Disposed of on merits |
| 4200 | In re Estate W. S. Stratton | Atty. Gen. Miller | Still pending |
| 6744 | In re Estate William Church | Atty. Gen. Miller | Disposed of on merits |
| 7323 | In re Estate Peter Magnes | Atty. Gen. Miller | Appealed |
| 7810 | In re Estate F. J. Bancroft | Atty. Gen. Miller | Disposed of on merits |
| 7865 | In re Estate Franklin Ballou | Atty. Gen. Miller | Disposed of on merits |

# Opinions

## DUTY OF ATTORNEY GENERAL.

It is no part of the duties of the Attorney General to settle disputes between the different owners or users of water under our irrigation laws, but the same should be settled in the courts.

Denver, Colo., May 28, 1903.

HON. JAMES H. PEABODY,
Governor of Colorado,
State Capitol.

Dear Sir—I am in receipt of your letter of to-day, informing me that you have been waited upon by a delegation of over two hundred users of water living along the Platte and Poudre rivers, lodging complaint against various corporations and individuals for the unlawful diversion of water to their great damage.

I also note that they presented you with a resolution requesting you "to instruct the Attorney General to prepare a detailed statement of the rights of the Denver Union Water Company to water from the South Platte and its tributaries as found in the judicial records, and cause the same to be given to the public through the press."

I also note that you question the right of the Governor or of the Attorney General to undertake the settlement of such questions, because it seems to you that it is one to be adjudicated by the courts of our community.

I fully concur in this view, and would state that, in my opinion, neither the Governor nor the Attorney General has any right, power, or authority in the premises.

The duties of the Attorney General are prescribed by statute, and the matters and things included in the resolution above referred to are not among those duties. Controversies like these are matters for settlement by the courts in properly litigated

cases between the parties in interest in which the parties employ their private attorneys.

If the Denver Union Water Company is diverting water in excess of its rights to the damage of other users of water, those who are damaged should apply to the courts for the appropriate relief, and any opinion that the Attorney General might render would have no value above that of any other reputable lawyer. It is not the duty of the Attorney General to appear for private parties in litigation affecting their private interests.

The Attorney General's office at the present time, and ever since the present administration assumed office, has been overcrowded with work which devolves upon it by express provision of the statutes, and the greatest economy of both time and money will have to be practiced in order to attend to the regular duties of the office under the appropriation allowed for this biennial period; so that it is absolutely necessary that no work other than that imposed by statute shall be undertaken.

The necessary work in the Attorney General's office very greatly increases with each year as the State grows, and few people have any adequate conception of the amount of work necessarily required of this department.

Regretting that there is nothing that I can do in the premises, I am,

Yours respectfully,

N. C. MILLER,
Attorney General.

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## CLASSIFICATION OF APPROPRIATIONS.

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Act of '97 and amendment of '99 classifying appropriations discussed and held constitutional. Ordinary and extraordinary appropriations defined. Mill levies take effect in order of passage of acts after giving preference to preferred levies. Appropriations pro rated, when. Maintenance and improvement. Appropriations of the second class take precedence over those of the third class.

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Denver, Colorado, July 30, 1903.

HON. JOHN A. HOLMBERG,
Auditor of State,
State Capitol.

Dear Sir—In reply to your request for my opinion as to the order of payment of appropriations, and particularly as to the act, entitled "An act regulating the payment of appropria-

tions in case the revenues of the State are insufficient to meet all appropriations made by the General Assembly," approved April 14, 1897, Session Laws, 1897, page 21, and the amendments thereto of 1899, Session Laws, 1899, page 21. I would say that this act has never yet been passed upon by the courts, so that we have no decisions, either upon its constitutionality or its construction.

In an opinion by Attorney General Campbell, construing this act, he expressed some doubt, without giving any reason therefor, as to its validity.

Attorney General's Report, 1889-1900, page 227.

But he stated that he would assume, for the purposes of that opinion, that the act was valid, and that it was the duty of the executive officers to strictly obey its terms. The act has, very properly, been assumed to be valid also by my immediate predecessor, Attorney General Post, and by other executive officers of the State.

It is certainly desirable that there should be some classification of appropriations, in order that the Auditor and Treasurer may rightly and duly administer the finances of the State.

To arrive at a correct opinion in this matter it is desirable to consider all constitutional provisions that may throw light upon the subject, and to know what was the law prior to the passage of this act in reference to the classification of appropriations. Upon this point Attorney General Campbell's opinion, above referred to, will furnish instructive reading, and should be consulted in connection with this opinion.

By section 2, article X, of the Constitution, it is made the imperative duty of the Legislature to provide, by law, a tax sufficient to defray the estimated expenses of the State government for each fiscal year.

People vs. Board of Equalization, 20 Colo., 220, 230.
In re Appropriations, 13 Colo., 316, 326.

Other sections of the Constitution limit the rate of taxation for such purposes to four mills, and provide that no appropriation shall be made, or any expenditure authorized, whereby the expenditure of the State for any fiscal year shall exceed the total tax provided for by law, and applicable for such appropriation or expenditure, unless the General Assembly making such appropriation shall provide for levying a sufficient tax, not exceeding four mills on each dollar of valuation; but appropriations or expenditures to suppress insurrection, defend the State, or assist in defending the United States in the time of war, are expressly excepted.

Sections 11 and 16, article X, Colo. Const.

The Supreme Court has held that said section 16 authorizes the General Assembly to make appropriations of two general classes or kinds, to wit:

"First—Ordinary, which include kinds of appropriations and expenditures necessary and proper for the support of the government and its institutions in time of peace.

"Second—Extraordinary, or such as are necessary 'to suppress insurrection, defend the State or assist in defending the United States, in time of war.'"

In re Appropriations, 13 Colo., 322.

As will be shown later, the first class of ordinary appropriations, necessary and proper for the support of the government and its institutions in time of peace, has been held by the Supreme Court to be subdivided by the Constitution into two sub-classes, judicially designated as preferred and non-preferred.

Prior to the passage of the act of 1897, above referred to, there was nothing, other than these constitutional provisions, which made any preference or classification in the matter of appropriations or expenditures. Our Supreme Court has held, in numerous decisions in construing these constitutional provisions, that the expenses of the Executive, Legislative and Judicial departments of the State government for each fiscal year, and the interest on any valid public debt, are entitled to preference over all other appropriations from the revenues of the State, without reference to the date of the passage of the acts making the appropriations, and irrespective of emergency clauses, thereby, in effect, holding that such expenses were, to use the language common in such matters since the adoption of the classification act of 1897, preferred claims of the first class.

Our Supreme Court, in a well considered opinion on this subject, said:

"Chief among the necessary appropriations are such as are sufficient to defray the estimated expenses of the State government for each fiscal year. This is the primary purpose for which an annual tax is required. It is made the imperative duty of the General Assembly, by the express terms of the Constitution, to provide by law for such a tax (article X, paragraph 2), though the rate of taxation therefor must not exceed the limitation specified in section 11 of the same article. Having provided a revenue for a special purpose, in obedience to the constitutional mandate, it is manifest that the fund can not be diverted to other objects until the primary purpose of its creation is satisfied. It would be trifling with a serious provision of the Constitution to hold that the obligation to provide a tax for a given purpose is imperative, but that the appropriation of the fund arising from such tax is optional.

"Considering the great care thus taken to secure and guard such appropriations, we can not doubt that the ordinary ex-

penses of the Legislative, Executive and Judicial departments of the State are the expenses primarily intended to be provided for by section 2, article X. It would be a deplorable condition of affairs if, by making excessive appropriations, or by authorizing improvident expenditures, under enactments containing emergency clauses, the constitutional limit should be reached before the passage of appropriations indispensable for the support and maintenance of the several departments of the government, whereby the latter appropriations should be rendered unconstitutional."

In re Appropriations, 13 Colo., 326-327.

This decision has been followed in subsequent decisions.

Henderson vs. People, 17 Colo., 589-590.

People vs. Board of Equalization, 20 Colo., 220, 230.

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 91.

Stuart vs. Nance, 28 Colo., 200.

After the payment of these preferred expenses, prior to the passage of the act of 1897, the proper rule for the payment of all other appropriations laid down by our Supreme Court was that the Auditor should issue warrants for such other appropriations in the order of the time of the taking effect of the legislative acts making such other appropriations, taking care never to issue warrants in excess of the funds and revenues provided for their payment.

Goodykoontz vs. People, 20 Colo., 374, 376-7.

Parks vs. Soldiers' and Sailors, Home, 22 Colo., 86, 91, 97, 100, 101.

It will be observed that the only constitutional classification of claims, as decided by our Supreme Court, is that of preferred claims and non-preferred claims.

Stuart vs. Nance, 28 Colo., 101.

And that as to preferred appropriations there is no priority between the respective acts making such appropriations.

"All preferred appropriations for a given fiscal year, either continuing, or those made at a session of the Legislature for that particular year, are of the same relative rank and importance."

Stuart vs. Nance, 28 Colo., 201.

Mill levies, being in the nature of continuing appropriations, take effect in the order of the time of the passage of the acts creating them, after giving preference to all preferred appropriations or mill levies which are, or may be, preferred.

People vs. Board of Equalization, 20 Colo., 220, 228, 229, 231.

And in case there are appropriations of the same grade made by separate bills bearing the same date, priority must be given as of the time of day of the taking effect of the several acts.

Parks vs. Sailors' and Soldiers' Home, 22 Colo., 86, 101.

It may be seen from the foregoing discussion that, before the passage of the act of 1897, regulating the order of payment of appropriations, or, as it is commonly spoken of, the classification of appropriations, the order of payment, whether or not there was a shortage of the revenues in any fiscal year, as well as of the status of all excess appropriations, were clearly fixed by the decisions of the Supreme Court, holding that it was the duty of the Auditor of State to classify,

First, as preferred, the appropriations for the Executive, Legislative and Judicial departments of the State, together with the appropriations for the payment of interest upon any valid debt;

Second, that he should classify next the several mill levies in the order of the passage of the several acts providing therefor;

Third, all other appropriations, and that these be classified by the Auditor in the order of the taking effect of the several acts making such appropriations.

Naturally, the Auditor first estimated the probable revenue for each fiscal year, and after making such estimate it was comparatively easy to determine what appropriations were in excess of the revenues of the State for that particular year, and would, therefore, be void, for our Supreme Court has held that such excess appropriations are absolutely void and create no indebtedness against the State, and entail no obligation, legal or moral, upon the people, or upon any future General Assembly.

In re Appropriations, 13 Colo., 323.

Such, then, was the law prior to the adoption of the act of 1897, and as it has been held by our Supreme Court, that under the law as it existed at that time, appropriations for State educational, reformatory or penal institutions had no precedence over other appropriations, and as it was evidently believed by the General Assembly of 1897 that there would be a deficiency of revenues to such an extent that, unless there was a classification of the appropriations authoritatively made by the Legislature, under the old rule providing that priority in time of the taking effect of the acts making the appropriations must govern after the appropriations preferred by the Constitution had been discharged, the appropriations for reformatory or penal institutions, and the like, where inmates are confined involuntarily, as well as appropriations for educational and charitable institutions of the State. would fail because in excess of the revenues.

It was evidently because of such a possibility that the Legislature of 1897 passed the act classifying appropriations, in case of deficiency in the revenues, into five classes, the first class to be made up of those appropriations for the ordinary expenses of the Legislative, Executive and Judicial departments of the State government and the interest on any public debt. It simply reiterated by statute the preference which, the Supreme Court has held, was made by the Constitution in that respect. This portion of the act in question is, therefore, not obnoxious to any constitutional provision. The remaining portion of the act divides all other appropriations into four distinct classes, viz.: as the second class, those appropriations which are for institutions such as the penitentiary, etc., wherein the inmates are confined involuntarily; as the third class, those for educational and charitable institutions; as the fourth class, those for any other officers and bureaus or boards; as the fifth class, all other appropriations.

As to the classification or rank of appropriations constituting the second, third, fourth and fifth classes in this act, and providing that they shall be paid in that order, there is nothing in the Constitution which expressly forbids such a classification.

The General Assembly of 1897 in enacting this statute undoubtedly had in mind the suggestion of our Supreme Court in a case decided the year previous, in which the court intimated, in the following language, that it was competent for the Legislature to pass such an act:

"It may be competent for the Legislature to provide that, in case of deficiency, the public funds shall be pro rated between claimants of the same grade."

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 101.

While, since the passage of this act, the courts have not construed it, they have referred to the act as being in existence in two cases. One where the court says:

"Further than this, the General Assembly (Session Laws, 1897, page 21) has passed an act to regulate the payment of appropriations in case of a deficiency of revenue, but we do not feel called upon at this time to explain or interpret these provisions."

In re Board of Equalization, 24 Colo., 454.

And, again, in the still later case when referring to the rule of priority based on the date of taking effect of appropriation acts as applicable to those appropriations other than for the Executive, Legislative and Judicial departments, the court says that that rule applies

"Only in case the General Assembly has not otherwise legally provided. This, it is said, has been done since the fore-

going decisions were rendered, but the act is not retrospective, as counsel agree. Session Laws, 1897, page 21."

Stuart vs. Nance, 28 Colo., 204.

I am of the opinion, therefore, by reason of these references of our Supreme Court, first anticipating and suggesting such a statute before its passage, and then twice after its passage referring to its existence, together with the fact that the act recognizes the constitutional preference, or classification, and that there is nothing in the Constitution expressly prohibiting such an act, that the act should be regarded as valid and constitutional, and that you should follow the same course followed by your predecessors in determining the priority of appropriations.

While as to appropriations of the first class there is no priority between the respective acts making such appropriations, yet, if you find that there is a deficiency in the revenue so that the appropriations of either the second, third, fourth, or fifth classes can not be paid, then appropriations of the second class must first be paid, then the third, and so on in case there are revenues sufficient to pay all the following classes, but in case the revenues are not sufficient to pay all the appropriations of any one of these classes other than the first, then, and in that case, as to appropriations of the same grade made by separate bills, priority must be given as to the time of taking effect of the several acts under that class, except as to those of the third class, which the amendment of 1899 expressly requires to be pro rated.

It will be noticed that, by the act of 1897, appropriations for maintenance and improvements in the second and third classes are not separated, but that appropriations for improvements, as well as for maintenance for institutions, such as the penitentiary, etc., where inmates are confined involuntarily, take precedence over appropriations for maintenance or improvements for educational and charitable institutions, which are of the third class.

If, in any biennial period, the Legislature sees fit to make extensive appropriations for improvements for institutions included within the second class, it may result in the depletion of the funds of the State to such an extent that there will be no funds available for paying the appropriations for the maintenance of the educational and charitable institutions, which are of the third class.

While it is unfortunate that the Legislature did not, in regulating the order of the payment of appropriations, separate appropriations for the maintenance of public institutions from those which are for improvements, and put the maintenance appropriations in a class having priority over the appropriations for improvements, and so prevent the possibility of such an unfortunate condition as not having funds sufficient to maintain the charitable and educational institutions of the State, yet, as

one of the executive officers of the State, charged with the duties of carrying out the laws which pertain to your office, you have no discretion in the matter, and must pay out the funds of the State in that order which the Legislature has directed.

But, certainly this fault should be corrected by the next Legislature and the appropriations for maintenance and improvements should be put in separate classes, with priority given to appropriations for maintenance, in order that the time may never come when the State shall be unable to maintain the Soldiers' and Sailors' Home, the Mute and Blind Institute, the Agricultural College, the Normal School, the School of Mines, or the State University.

In other words, appropriations for improvements ought, in every case, to be classified after those for maintenance of institutions of the second and third classes.

Yours respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

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## CONTINUING APPROPRIATIONS.

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**Where there is a conflict between a salary as fixed by a special statute, and a salary as fixed by appropriation bill, the former wil govern.**

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Denver, Colo., July 10, 1903.

HON. WHITNEY NEWTON,
Treasurer of State;

HON. JOHN A. HOLMBERG,
Auditor of State,
Denver, Colo.

Gentlemen—The absence of an appropriation bill makes it important to answer constant inquiries in relation to those officers whose compensation and expense accounts are fixed by statute.

The matter has been passed upon so often by the attorneys general of this State that it is unnecessary to write an opinion at length. I shall content myself with simply referring to those opinions and stating the decisions of our Supreme Court.

The Attorney General's opinions will be found in the administration of General Carr, 1897-1898, on pages 83, 84, 88, 96, 100, 118 and 196.

The opinion of General Campbell, 1899, 1900, will be found on page 233 of his public opinions. This opinion is very lengthy, and is an exhaustive consideration of the financial questions arising in your offices.

I also refer you to the opinions of the Attorney General for the years 1895-1896, pages 144 and 152; also to the report of the Attorney General of Colorado, for the years 1899-1900, pages 60 and 93—this was in the administration of the Hon. Samuel Jones; you are also referred to the opinions of the Attorney General for the years 1891-1892, at page 23—this is in the administration of the Hon. Joseph Maupin.

In addition to these opinions, I refer you to the People vs. Goodykoontz, 22 Colo., page 509. The opinion can hardly be quoted from, as it is all valuable and instructive reading on that question, and holds that the statute makes a continuing appropriation, and that the Auditor shall pay the officer in accordance with the statute. I quote the following on a point which is sometimes debated, as to whether there is a difference between a statute and a constitutional provision. The court said:

"The difference between a constitutional and statutory appropriation is unimportant in the consideration of the question now before the court. We are simply to determine whether or not an appropriation has been made by Constitution or by the statute."

The object of appropriations is to prevent administrative officers from disbursing money at their pleasure. The Legislature, in some manner, measures and controls the amount which can be applied to a given purpose. It is immaterial whether this provision is made by statute or by an appropriation bill.

The court further says:

"We conclude that the act creating the office of State Boiler Inspector and fixing his salary, when considered in connection with other statutes, designating the time, mode and manner of payment, constitutes a continuing appropriation for such salary, and that no further legislative sanction is necessary to authorize the proper officers to pay the sum."

A further point has been raised in reference to the effect of the general appropriation bill upon special statutes, when the appropriation varies from the amount mentioned in the statute. My own judgment is that the title of the appropriation bill limits it to the mere purpose of appropriating money, and is not broad enough to allow it to include a repeal of a special statute.

The effect of Judge Carpenter's decision is just as binding and imperative as if made by the Supreme Court; therefore, you

will understand that the appropriation bill of the regular session of the 14th General Assembly is nullified.

Reference is also made to the People vs. the Board of Equalization, 20 Colo., 220, 232, and In re Continuing Appropriations, 18 Colo., 192.

I refer you to the opinion of General Post, 1901-1902. The Attorney General in that opinion holds that where the general appropriation bill mentions a less sum than that provided for by the statute, the Auditor should set aside from the general fund, a sufficient amount to make up the sum provided for by the statute creating the office and defining the sums to be paid for salary and expenses.

The reasoning given is, that a general appropriation bill can embrace nothing but appropriations, and where the salary and expenses are provided for in the statute which creates the office and defines the duties, such a statute can not be repealed by an appropriation bill which is considered only with reference to the sum which the Legislature deems appropriate for that office, and which does not take into consideration, at all, the special statute.

Often, the Legislature acts in total ignorance of the existence of the special statute. In fact, I am convinced that, generally, that is the case, and it would be very much better if the Legislature would leave out those appropriations entirely from the general appropriation bill.

Persons who are familiar with the preparation and enactment of an appropriation bill, know that the Finance Committee is not familiar with these special statutes, and do not know that they are conflicting with them in varying the sums.

In Goodykoontz vs. Acker, 19 Colo., 360, the Supreme Court held that the act providing that the Inspector of Metalliferous Mines shall receive a salary of $3,500.00 per year, and ten cents per mile for mileage actually traveled, to be paid out of any money appropriated for that purpose, does not constitute an appropriation. The court maintains that this statute must be supplemented by an appropriation to pay the salary. This statute differs from nearly all the other statutes to which we refer as continuing appropriations.

The act in relation to metalliferous mines is found in Session Laws of 1889, at page 254, and provides for the payment of the salary out of the funds to be appropriated.

When the Legislature creates an office, bureau, or department of government, it places a limit on the expenses which can be incurred in the conduct of the office. The statute which does this, is more than an appropriation—it is the establishment of the salary or compensation.

An appropriation bill is less; it is simply the creation of a fund out of which salaries and expenses are to be paid. It has been the practice in this State to leave unsettled by statute, the

compensation of employes. Their tenure of office is one of employment, merely, but the limit of the pay is prescribed by the appropriation bill which provides the only money out of which employes can be paid. Without such a fund no legal employment can be made, and no payment can be made for work.

Hence, when the Legislature provides, in the general appropriation bill for employes, by making a stated and specific appropriation for each, it is binding as to such. It is the only provision existing as to their payment.

This is quite different from a clause in such bill, appropriating money to meet the salary fixed by a separate statute. In my judgment, the special statute passed to fix the amount of salary and limit of expenses, can not be changed by an appropriation bill. The title of the bill is not broad enough to allow the Legislature to go into the work of revising or changing salaries, fees, or expenses.

The general appropriation bill is introduced after the first thirty days, and is limited to setting apart money out of the general fund for the purpose of meeting the expenses of the Executive, Legislative and Judicial departments. If these expenses have been determined as to amount by other legislation, all the appropriation bill can do is to set apart the funds to pay them. Such legislation is wholly unnecessary, and the general appropriation bill is encumbered year after year with needless matters and things, which ought to be omitted.

It is possible that the items are included as a convenience, but because they are inserted continuously, ignorance of existing statutes settling them, causes a wrangle.

I believe that the statute, in every case, should govern where there is a conflict between the appropriation bill and a special statute.

Respectfully submitted,

N. C. MILLER,
Attorney General.

## MILL LEVIES.

Mill levies for state institutions are under the control of the Legisature, but they are subject to the same classifications as special appropriation.

Denver, Colorado, March 13, 1903.

MR. H. D. THOMPSON,
Member of the Board of Regents,
State University.

Dear Sir—In reply to your question as to the standing of the mill levies instituted by the Legislature in support of the educational institutions of our State, I have to say:

These levies are only continuing appropriations and are subject to the control of the Legislature at any time. Their advantage is that they relieve the General Assembly of the necessity of making a particular appropriation at each biennial session, and afford the State institutions a fixed income.

I understand that the objection is urged that the levies stand in the position of a preferred appropriation. In reply I will say that this is a misconception of the manner in which they are dealt with in the Auditor's and Treasurer's offices. The only difference between these appropriations and those which the Legislature makes biennially, is that the one is a continuing appropriation and the other is fixed at each session. For instance, the 2/5 mill levy proposed for the State University would stand on an equality with the particular appropriations made for other institutions, and it would have to pro rate with those appropriations. The current revenues of any year are applicable to the payment of appropriations of the first class; then to those of the second class, which are institutions of involuntary confinement; and, thirdly, to the educational and charitable institutions. None of these mill levies are honored until all of the appropriations of the first and second class are paid; then, if there is not revenue to pay those of the third class in full, they must pro rate, and it matters not whether these appropriations are created by particular legislation, or at each session, or whether they be continuing appropriations governed by the mill levies.

These matters are fully discussed in In re State Board of Equalization, 24 Colo., 446, 454, and in other opinions of the Supreme Court, and are fully discussed by Attorney General Campbell in his opinion.

Respectfully,

N. C. MILLER,
Attorney General.

## TERM OF OFFICE OF ADJUTANT GENERAL.

**The term of office of Adjutant General begins on April 1, and continues for two years. In case he is not appointed on April 1, his predecessor holds over until he is appointed and qualified.**

HON. JAMES H. PEABODY,
Governor of Colorado,
Capitol.

Dear Sir—In reply to your request for a written opinion as to the expiration of the Adjutant General's term of office, I have examined the statutes and beg leave to submit the following:

"The Adjutant General shall hold his office for the term of two years and until his successor is appointed and qualified, unless sooner removed for misconduct or in case of the vacation of his office by resignation, duly accepted."

Section 1, article 4, National Guard Laws, 1891.

"The Governor shall be Commander-in-Chief of the organized militia * * * and he shall, immediately upon assuming his office, appoint an Adjutant General, * * one Assistant Adjutant General, * * one Inspector General, * * one Surgeon General, * * two or more Aides-de-camp, and a Military Secretary * * ; all to take office on April 1, after the inauguration of the Governor, and to serve for two years, unless sooner removed by him * *."

Section 1, article 3, National Guard, 1897.

Both of these sections are contained within the same act, and a rule is established that sections of the same act, speaking on the same subject, shall be read together and harmonized, if possible.

I see no difficulty in reconciling these two sections. The term of office of the Adjutant General is to be two years, and is to commence on April 1. In case he is not appointed on April 1, his predecessor holds over until he is appointed and qualified, according to article 4.

Now, this does not mean that an executive appointment can nullify a legislative enactment and change the time of the commencement to such period as the executive may make the appointment. The Legislature has power to say when this term should commence, and it has spoken on the question, and the

time it has fixed controls, and when one holds over into the term of his successor, the latter has simply lost so much of his term.

Respectfully,

N. C. MILLER,
Attorney General.

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## BIENNIAL REPORTS.

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The law designates the maximum number of pages of official reports, and no state officer has a right to exceed this number of pages in his report, nor can the state printer recover for printing any report for more than the statutory maximum number of pages.

The legislature has the power to take up the question of bills for printing such reports and adjusting such along the above lines.

The auditing committee of the new administration has no authority to audit bills for printing contracted under the old administration.

The quantity and character of printed blanks, letter heads, schedules, bulletins and miscellaneous papers are within the discretion of the Secretary of State, and his orders will bind the people.

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Denver, Colo., March 28, 1903.

HON. R. G. BRECKENRIDGE,
Chairman Committee on Appropriations,
House of Representatives,
Capitol.

Dear Sir—In reply to the communication made over your signature to the Attorney General for an opinion, I will report as follows:

1. A copy of your statement of facts and interrogatories is attached hereto for reference.
2. The contract under which this printing was done was made and entered into in September, 1902.

### IN RELATION TO THE HISTORY OF THE STATUTES ON STATE PRINTING.

The Session Laws of 1877 provided that the State officers should limit their reports to one hundred and fifty copies, but made no limit as to pages, and provided that one hundred copies should be preserved for binding.

Gen. Laws, 1877, page 670.

In 1879 an amendment was enacted omitting the portion about binding.

General Laws, 1879, page 144.

In 1881, the Legislature directed the officers of State institutions to report to the Superintendent of Public Instruction, and required the Superintendent to print so much of the reports as would not exceed ten pages for each institution.

Session Laws, 1881, page 206.

This statute is also found in the General Laws of 1883, at page 747.

The act of 1889 provided:

"Of each of the reports of such officers there shall be published five hundred copies for the use of the General Assembly and State officers; Provided, none of these reports shall exceed one hundred and fifty pages."

Session Laws, 1889, page 417.

The Act of 1891 allowed the heads of departments one hundred reports, and left the number of pages unlimited; but reduced the number of other reports to two hundred and fifty, except the State Engineer and the Superintendent of Public Instruction, each of which was fixed at five hundred copies, and reduced the number of pages in all other reports to twenty.

Session Laws, 1891, page 264.

The Act of 1895 provides:

"It shall be the duty of the Secretary of State to place said reports in the hands of the person authorized to do the public printing, and superintend the printing of the same, and see that it is done in a proper manner. Of the reports of the elective officers, there may be published one thousand copies or less, and of all other reports, two hundred and fifty copies or less; Provided, That there shall be five hundred copies each of the reports of the State Superintendent of Public Instruction and State Engineer; and, Provided, further, That no report except those of elected State officers and State Engineer shall exceed one hundred pages."

Session Laws, 1895, page 229.

It will be observed that the statute of 1895 does not limit the number of pages of the reports of elected officers, but does provide that the reports of all other officers except the State Engineer shall not exceed one hundred pages. There is, therefore, no use in considering the argument of counsel for the Smith-Brooks Printing Company in the case against Auditor Parks, and filed in the Supreme Court as No. 3570, and which

was afterwards dismissed from said court without an opinion. The decision of the lower court was probably correct in that case, and was founded upon the doctrine that there being no limitation as to the number of pages, it was within the discretion of the Secretary of State to determine what was necessary, and when he passed upon that subject, as authorized by law, and ordered the printing, that the State was bound by his act, and the Auditor had not authority to pass upon the question. As to all printing other than the reports, the requisition is full authority to print, and when the bill is audited, the State is bound.

But the brief goes on further and discusses that in many instances the auditing of bills is taken away from the State Auditor and placed with other officers of the State, and that where this is done by a valid legislative enactment, the finding of such other officer is conclusive upon the Auditor. And if the Legislation of this State had to cease at this point, in the absence of fraud, the State would be bound by the finding of Mr. Mills and the Auditing Board.

But as to this fact, I wish to report that the money to pay for these bills is to come out of the contingent fund, if paid at all, and the proper person to audit bills payable out of that fund is the Auditing Board, and that these bills have not been so passed upon, and the custom of the Secretary of State, as we are informed, in passing upon bills in the preceding administration is not binding.

There are some matters on which the finding of the measurer of public printing is binding, and he is required to measure up the printing and pass it over to the Auditing Board for ultimate judgment, but the action of the Auditing Board is necessary in addition. I may say that all these bills which remain in the Secretary of State's office have not passed through any process of auditing by the board.

This condition was not true at the time the case against Parks was tried. The law was otherwise then, as the Secretary of State was the supreme and only authority to order and audit printing bills, and no limit was fixed as to the number of pages.

The last Act on this subject is found in 1901.

"It shall be the duty of the Secretary of State to place said reports without delay in the hands of the person authorized to do the public printing and superintend the printing, and see that it is done in a proper manner. Of each of the reports from elective State officers there may be printed and published one thousand copies, or less, and of all other reports, two hundred and fifty copies, or less; Provided, That there shall be two thousand copies of each of the reports of Superintendent of Public Instruction and State Engineer and Labor Commissioner; and,

Provided, further, That no report shall exceed three hundred pages, etc."

Session Laws, 1901, page 239.

It will be seen that an important addition was made in this last section, viz., a limit was fixed to the number of pages of each report of the elective officers.

The following facts are furnished us by the Secretary of State upon request, as to the number of reports and pages, of the recent officers:

| Officer. | Copies. | Pages. | Cost. |
|---|---|---|---|
| Superintendent Public Instruction | 2,000 | 650 | $5,085.57 |
| State Normal School | —— | —— | —— |
| Industrial School for Boys | —— | —— | —— |
| Bureau Labor and Statistics | 2,000 | 567 | 3,211.16 |
| State Engineer | 1,200 | 334 | 2,220.77 |
| Auditor of State | 1,000 | 335 | 3,030.62 |
| Secretary of State | 1,250 | 286 | 2,425.08 |
| State Treasurer | 600 | 130 | 967.55 |
| Attorney General | 1,000 | 216 | 923.58 |
| Board of Horticulture | 2,000 | 272 | 1,462.78 |
| Dairy Commissioner | 250 | 90 | 272.41 |
| Insane Asylum | 250 | 64 | 357.32 |
| State Industrial School for Girls | 250 | 46 | 332.93 |
| State Industrial School for Boys | —— | 38 | Printed at Institution. |
| State Reformatory | 250 | 38 | 216.40 |
| State Fish and Game | 250 | 30 | 243.31 |
| State Penitentiary | 250 | 178 | 892.01 |
| State School Deaf and Blind | 250 | 62 | 587.91 |
| State Board of Pardons | 250 | 114 | 294.64 |
| State Coal Mine Inspector | 250 | 230 | 709.59 |
| State Board of Health | 1,250 | 370 | 3,062.80 |
| State Dependent and Neglected Children | 250 | 42 | 314.04 |
| State Land Board | 250 | 50 | 276.76 |
| State Board Charities and Corrections | 500 | 174 | 814.20 |
| State Board Arbitration | 250 | 56 | 58.39 |
| State Soldiers' and Sailors' Home | 250 | 70 | 332.14 |
| State Stock Inspector's Board | 250 | 8 | 15.11 |
| State Adjutant General | 250 | 146 | 482.62 |
| Bureau of Mines | 1,000 | 314 | 1,216.50 |
| Child and Animal Protection | 1,500 | (Allowed 2,000) | 380.56 |

It will be seen from the Act of 1901 just quoted that the State Engineer, Labor Commissioner and Superintendent of Public Instruction are each allowed two thousand copies, but no officer is permitted by this statute to exceed three hundred pages.

Sec. 332.

Section 3328, volume 1, Mills' Annotated Statutes, limits the pages of the report of the Superintendent of Public Instruction to ten each in the case of the State University, School of Mines, Agricultural College and Mute and Blind Institute.

The Act in relation to the Industrial School requires the Board to report to the Superintendent of Public Instruction, and inferentially, of course, it becomes a part of the proceedings of her office, on which she may again report. And I would regard that it was within her discretion as to how much she might say in reporting upon this report to her, except that the entire matter contained in the report must be brought within three hundred pages. In other words the matter from the report of the Industrial School is not limited to ten pages.

Secretary of State,

1,000 copies of 300 pages.

S. L., 1901, pages 239-240.
1 M. A. S., 319, page 218.

Auditor of State,

1,000 copies of 300 pages.

S. L., 1901, pages 239-240.
1 M. A. S., 1820.
1 M. A. S., 319, page 218.

State Treasurer,

1,000 copies of 300 pages.

S. L., 1901, pages 239-240.
1 M. A. S., 1792.
1 M. A. S., 319, page 218.

Attorney General,

1,000 copies of 300 pages.

S. L., 1901, pages 239-240.
1 M. A. S., 319, page 218.

Superintendent of Public Instruction,

2,000 copies of 300 pages.

S. L., 1901, pages 239-240.
2 M. A. S., 3974.
2 M. A. S., 3327-3328.
1 M. A. S., 319, page 218.

State Engineer,

2,000 copies of 300 pages.

S. L., 1901, pages 239-240.
1 M. A. S., 2468.

Adjutant General,
250 copies of 300 pages.
S. L., 1901, pages 239-240.
Section 2, S. L., 1897, page 196.
Section 7, S. L., 1897, page 206.

Commissioner of Mines,
At least 1,000 copies of 300 pages.
S. L., 1901, pages 239-240.
Section 9, S. L., 1899, pages 282-283.

Coal Mines Inspector,
1,000 copies of 300 pages.
S. L., 1901, pages 239-240.
2 M. A. S., 3197.

Steam Boiler Inspector,
250 copies of 300 pages.
S. L., 1901, pages 239-240.
2 M. A. S., 4193.

Dairy Commissioner,
250 copies of 300 pages,
S. L., 1901, pages 239-240.
3 M. A. S., 8.

Game and Fish Commissioner,
250 copies of 300 pages.
S. L., 1901, pages 239-240.

Specially and further limited, however, as to the cost of the report by the Act of 1899 creating this department, in that the cost of the report must not exceed $250.
Section 10, S. L., 1899, pages 186-187.

Labor Commissioner,
2,000 copies of 300 pages.
S. L., 1901, pages 239-240.
1 M. A. S., 300.

State Board of Health.

The State Board of Health is not required to make a report to either the Governor or the Legislature, but is required to

collect information and statistics on matters of public health and "disseminate such information among the people," and the Secretary of State is expressly required to "furnish such stationery and printing as may be required for the official work of the Board."

3 M. A. S., 3538-3546 b.

The number of copies and pages is, therefore, not limited otherwise than by the amount of money appropriated therefor.

Board of Capitol Managers,
250 copies of 300 pages.
S. L., 1901, pages 239-240.
1 M. A. S., 335.

State Board of Dental Examiners,
250 copies of 300 pages.
S. L., 1901, pages 239-240.
Section 8, S. L. 1897, page 147.

State Board of Pharmacy,
250 copies of 300 pages.
3 M. A. S., 3483-3484.

State Board of Agriculture,
250 copies of 300 pages.
S. L., 1901, pages 239-240.
1 M. A. S., 64.

School of Mines,
250 copies of 300 pages.
S. L., 1901, pages 239-240.
2 M. A. S., 4079.

Mute and Blind Institute,
250 copies of 300 pages.
S. L., 1901, pages 239-240.
2 M. A. S., 3254.

Insane Asylum,
250 copies of 300 pages.
S. L., 1901, pages 239-240.
2 M. A. S., 2972.

Soldiers' and Sailors' Home,
250 copies of 300 pages.
S. L., 1901, pages 239-240.
3 M. A. S., 410 g.

State Penitentiary,
250 copies of 300 pages.
S. L., 1901, pages 239-240.
2 M. A. S., 3422-3423.

State Reformatory,
250 copies of 300 pages.
S. L., 1901, pages 239-240.
3 M. A. S., 4154.

State Board of Charities and Corrections,
250 copies of 300 pages.
S. L., 1901, pages 239-240.
3 M. A. S., 384 f.

State Board of Pardons,
250 copies of 300 pages.
S. L., 1901, pages 239-240.
3 M .A. S., 1506 f.

Bureau of Child and Animal Protection,
2,000 copies of 100 pages, to be published annually.
Sections 5 and 6, S. L., 1901, page 192.

Industrial School for Boys,
250 copies of 300 pages.
S. L., 1901, pages 239-240.

Under section 17 of article IV of the Constitution, the report must be made to the Governor, so it comes under the 1901 Act above cited, as to number of copies and pages.
1 M. A. S., 319, page 218.

But a statute also requires a report to the Superintendent of Public Instruction, which that officer may report as a part of her report, provided it does not exceed 10 printed pages.
1 M. A. S., 2169.

Industrial School for Girls,
250 copies of 300 pages.
S. L., 1901, pages 239-240.
Section 19, S. L., 1897, page 74.
1 M. A. S., 2197.

Foundling and Orphans' Home,
250 copies of 300 pages.
S. L., 1901, pages 239-240.
2 M. A. S., 3342.

Bureau of Child and Animal Protection,
2,000 copies of 100 pages.
Sections 5 and 6, S. L., 1901, page 192.

Register of State Board of Land Commissioners,
250 copies of 300 pages.
S. L., 1901, pages 239-240.
2 M. A. S., 3630.

The statute last cited does not say to whom the report shall be made, but requires a biennial report of the business of the office and the land affairs of the State, and such other "information concerning State lands as the State Board may deem worthy of publication," so I regard it as a report the Legislature required to be published.

State Board of Arbitration,
1,000 copies of 400 pages.
S. L., 1901, pages 239-240.
Sections 10 and 11, S. L., 1897, page 26.

State Board of Horticulture,
2,000 copies.
Sections 11 and 12, S. L., 1897, pages 63-64.
Limited to 300 pages.
S. L., 1901, pages 239-240.

Board of Examiners of Horseshoers,
250 copies of 300 pages.
S. L., 1901, pages 239-240.
S. L., 1897, section 4, page 166.

Home for Dependent and Neglected Children.

The Board of Control of this Home is, by statute, required to report to the State Board of Charities and Corrections, and not to the Governor or the Legislature.

3 M. A. S., 422 q.

State Board of Inspection.

I find no express requirement of the statutes for a report from this Board to the Legislature, the Governor or any other State officer, though the Secretary of State informs me there were 250 copies of a report of eight pages published recently.

State Veterinary Board, and State Veterinary Surgeon.

The yearly report of this Board and officer is required to be published with the annual report of the State Board of Agriculture, but bulletins are required to be published from time to time for the benefit of the people.

2 M. A. S., 4298.

In relation to the State University, the money is turned over to the Regents and expended by them, and the statute does not apply.

It should be borne in mind that where there is a special statute regulating the number of volumes and pages, such special statute controls.

## DISCUSSION OF THE LAW.

"Where an officer's power depends upon the public statutes, all who contract with him are presumed to know the extent and limitations of his authority."

Enc. of Law, 1st Ed., volume XIX, page 505, Story on Agency, section 302.

"Persons dealing with public officers as such, are presumed to know and are charged with knowledge of the nature of their duties, and the extent of their powers."

Enc. of Law, volume XIX, page 460, and citations.

"The government, and other public authority, are not bound by the acts, declarations or admissions of its officers or agents, unless it manifestly appears that such officers or agents are acting within the scope of their authority. The authority of a public officer, being fixed by law, is presumed to be known by all persons having dealings with him in his official capacity, and they deal with him at their peril, so far as the liability of the government is concerned."

Enc. of Law, volume XIX, 506.

"The law imputes to every one dealing with public officers acting under special statutory authority full knowledge of the extent of such authority."

Mitchell vs. St. Louis, Co., 24 Minn., 459.

"Those who deal with the officers of a municipal corporation must ascertain at their peril that these agents are acting within the scope of their lawful power."

Cheney vs. Brookfield, 60 Mo., 53.

The history of the legislation in Colorado on the subject of the printing of reports convinces one that the Legislature was seeking, at all times, to place restrictions around the officers to prevent extravagance. It has been asserted by some elective officers that they could not compress their report within the limit of three hundred pages. The elective officers have no discretion in relation to the number of pages over three hundred. It does not lie within the discretion of an executive officer to nullify an Act of the Legislature.

In relation to the inability to compress reports within three hundred pages, there are certain things which are indispensable in a report. These should be printed, but only within the fixed limit. This is not a question of propriety as to selection. The mandate of the law is imperative that officers must bring their reports within these limits. No one knows this fact better than the public printer. The executive officers come and go and the public is treated to constant change, but the public printer goes on forever; and I hold that the law is as binding upon him who receives a contract as upon the officer who makes it.

It has been suggested that the several officers who have prepared reports in excess of the limit fixed by the statutes have not faithfully performed the duties of their office and are, therefore, liable upon their bond. It is argued that the Legislature might appropriate the money necessary to pay the bills for these reports, even to the excess, in as much as the Secretary of State received the manuscript and turned it over to the public printer and ordered the work done. We have already quoted the law that the Secretary of State has no discretion in allowing reports to be printed in excess of three hundred pages, and, therefore, it can not be reasoned that by delivering the manuscript he bound the State. If there was any discretion left with him on this matter his act in ordering the work done might bind the State.

We are, therefore, of the opinion that Smith-Brooks took the work and finished it at their peril. The relation of the officer to the State is that of agent, and his powers and duties are prescribed by statute, and everyone dealing with him must be charged with knowledge of the limits.

There is no right of action upon the official bonds of the officers except in favor of the People of the State of Colorado, and any individual who may be specially injured by an act of an officer.

Now, if the Legislature, knowing all the facts in this case, appropriated the money to pay these bills, and the Auditor, Treasurer and Auditing Committee, with full knowledge of all the facts existing, authorized and paid the bills, could the People of the State of Colorado bring suit upon the official bonds of the various officers for the unfaithful performance of duty? An affirmative answer would mean that the State, through its officers or agents, could help consummate a wrong or injury to the people, and then turn around and sue the elective officer who took the first step in the wrong direction. If an action of one of its elective officers resulted in damage to the People, the People might maintain an action on the bond, but in my judgment it would be preposterous to say that the Legislature or any other officer could go on and complete this wrong and then fall back on the bond of the elective officer for preparing a report in excess of that allowed by law.

It has been further inquired, what is the remedy when an officer prepares a report in excess of the amount allowed by law? My first answer to this is, that the printer, who is conversant with the number of pages that a report will make, should exercise his own judgment, either in rejecting the report altogether, or returning it with the request that it be condensed within the limit. If these officers find that their report will not be printed unless brought within the proper space, they will find a way to condense.

"Express grants of power of public officers are usually subjected to a strict interpretation, and will be construed as conferring those powers only which are expressly imposed or necessarily implied.

"Such an officer, therefore, can create rights against the State or other public authority, represented by him, only while he is keeping strictly within the limits of his authority, as so construed."

Mechem Pub. Off., section 511, and citations.

State vs. Hastings, 10 Wis., 518.

State vs. Hayes, 52 Mo., 678.

As I have previously stated, the statute of 1901 fixes the limit as to the number of pages, and the best lesson that the State of Colorado could teach would be to enforce, to the fullest extent, the provisions of said statute, and let the damage fall where it will.

However, there is a sum due the Smith-Brooks Company for the printing of these reports, and that is to be determined

by the number of pages and volumes that were printed, and this you will be justified in estimating and making an appropriation to pay, and the bill should provide that the acceptance of the money so appropriated should be in full for all claims. This is a common provision relating to the payment of claims filed with County Commissioners in several states.

I would, therefore, recommend that the Legislature determine this amount and settle this matter, so that future Legislatures will not be harassed with relief bills to pay an account in controversy.

The history of Colorado shows that, sooner or later, the evidence fades away in the memory of the officials, while it remains ever vivid in the minds of the claimant, and the result is that sufficient pressure is brought to bear to secure the passage of a relief bill.

Finally, I would say, in answer to your specific question, that the Legislature has settled the necessity of a report exceeding three hundred pages, and that matter is not open to argument under the statute.

The Smith-Brooks Company should have rejected the manuscript, or brought it back to the Secretary of State, and given the officer an opportunity to compress it within the limit required by the statute, and if he refused, then to decline to print it, and such refusal would not forfeit the contract.

In answer to your last question, I must say that the State Auditing Board determined on November 30, 1902, and the new board did not come into existence until the short appropriation bill was passed, and that bill had no appropriation in it for the payment of printing bills, and, therefore, the Auditing Board has no jurisdiction to pass upon printing bills. It only has authority to pass upon bills payable out of the contingent fund created by the short appropriation bill, and the bills of Smith-Brooks are not among those.

I believe that the Legislature has full power to take this matter in hand and settle it along the lines indicated in this opinion, and it is a business proposition for them to do so.

As to the printing of blanks, letter heads, schedules, bulletins and miscellaneous papers, the quantity and character are within the discretion of the Secretary of State, and the order of the printing of such things by him binds; the contract covers the price, and it is merely a problem of computation to determine what is due for this class of work.

The case of Smith-Brooks against Auditor Parks is applicable to printing of this kind, because the quantity of such printing is open and the order of the Secretary binds.

Yours truly,

N. C. MILLER,
Attorney General,
And H. J. HERSEY.

## APPROPRIATIONS, CONTINUING.

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**The act of 1889, establishing the office of Steam Boiler Inspector, constituted a continuing appropriation. The claim of the Steam Boiler Inspector for salary and mileage is a preferred claim, and payable as those of other state officers.**

**The claim of F. H. Hegwer, State Steam Boiler Inspector, for salary and mileage from December 1, 1894, to February 15, 1895, if unpaid, may be paid out of revenue of 1895 now on hand.**

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Denver, Colo., September 19, 1904.

HON. WHITNEY NEWTON,
State Treasurer,
Denver, Colorado.

Dear Sir—I have your request for my opinion in reference to the claim of Ferdinand H. Hegwer, for unpaid salary and mileage, as State Steam Boiler Inspector, from December 1, 1894, to February 15, 1895, which request is as follows:

"There is $506.52 cash credit to the revenue of 1895, and outstanding warrants amounting to $124.91. The Auditor has issued to Mr. F. H. Hegwer a salary warrant for $380.00, drawn against the above mentioned revenue. I understand you have gone into this matter at some length, and wish you would kindly advise me at once whether I shall register and pay the above warrant for $380.00."

In reply I would say that I advised the Auditor orally in reference to this matter, and in view of your written communication I take advantage of the opportunity to put my opinion in writing.

Mr. Hegwer was the State Steam Boiler Inspector from May, 1893, to February 15, 1895, and, during his term of office, there seems to have arisen some difference of opinion as to how his salary and mileage should be paid, which was finally determined by our Supreme Court, in April, 1896, in the case which he brought against the then State Auditor, in which it was held that his claim was a preferred claim against the State, the same as that of any other State officer, and that the act of 1889, establishing the office of State Steam Boiler Inspector, and fixing the annual salary at $2,500.00, and mileage at 10 cents a mile, constituted a continuing appropriation, and that no further legislative action was necessary to authorize the proper officers to pay the same.

The People ex rel. Hegwer vs. Goodykoontz, 22 Colo.. 507.

After this decision was rendered by the Supreme Court, it seems that Mr. Hegwer presented vouchers for the salary and mileage above referred to, aggregating, less credits, $604.74. These vouchers were presented to the then Attorney General, Hon. B. L. Carr, by the then Auditor, Hon. C. C. Parks, and, after examination by the Attorney General, were returned to the Auditor, with a written opinion of approval, dated June 16, 1896, which opinion will be found in the Report of the Attorney General for the years 1895-96, at page 144.

It seems, from the affidavit of Mr. Hegwer, attached to the present vouchers submitted to the present Auditor, that the original vouchers have been misplaced, either in the Auditor's office, or in the Governor's office, and can not be found.

I was informed by the present Auditor, as I am by your letter, that there is a cash credit to the revenue of 1895 of $506.52, and an outstanding warrant drawn against that fund in the amount of $124.91. I, therefore, advised the Auditor that he might safely draw a warrant in favor of Mr. Hegwer for $380.00, to apply on his account, provided his books and yours show that Mr. Hegwer had not been paid for the months covered by these vouchers, above referred to, and that such payment should be made out of the revenues of 1895; and that the balance of the claim should be paid as the revenues for that year came in. I am,

Yours respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

## APPROPRIATIONS, EXPIRATION OF.

**Where no indebtedness is created against an appropriation during a biennial period, it expires at the end of such period. This does not apply to an appropriation for a relief bill, which continues until paid.**

Denver, Colo., July 8, 1903.

HON. WHITNEY NEWTON,
State Treasurer,

HON. JOHN A. HOLMBERG,
Auditor of State,
Denver, Colo.

Gentlemen—I have inquired into the following list of appropriations passed by the Twelfth General Assembly, in 1899:

APPROPRIATIONS BY THE TWELFTH GENERAL ASSEMBLY REMAINING UNPAID—EMERGENCY CLAUSE ATTACHED.

1. S. B. No. 143, appropriated for Insane Asylum building, approved April 13, 1899, 11:20 a. m., $40,000.00.

2. S. B. No. 76, appropriated for Penitentiary improvement, approved April 13, 1899, 11:25 a. m., $4,000.00.

3. S. B. No. 194, appropriated for Reformatory heating plant, approved April 13, 1899, 11:32 a. m., $8,500.00.

4. H. B. No. 266, appropriated for Paris Exposition, approved April 12, 1899, 12:04 m., $250.00.

5. S. B. No. 296, appropriated for Girls' Industrial School building, approved April 18, 1899, 3:40 p. m., $25,000.00.

6. S. B. No. 104, appropriated for Reformatory relief, approved April 4, 1899, 10:55 a. m., $22,631.00.

7. S. B. No. 29, appropriated for Colorado Volunteers, Civil War, approved April 4, 1899, 11:50 a. m., $2,500.00.

8. S. B. No. 282, appropriated for Board of Library Commissioners, approved April 10, 1899, 9:20 a. m., $500.00.

9. S. B. No. 143, appropriated for Insane Asylum deficit, approved April 13, 1899, 11:20 a. m., $18,636.40.

10. S. B. No. 61, appropriated for Deaf and Blind, approved April 13, 1899, 11:22 a. m., $22,569.00.

11. S. B. No. 74, appropriated for Penitenary deficiency, approved April 13, 1899, 11:37 a. m., $25,704.02.

12. S. B. No. 131, appropriated for Soldiers' and Sailors' Home, approved April 13, 1899, 3:00 p. m., $45,000.00.

13. H. B. No. 154, appropriated for Normal School, approved April 13, 1899, 2:30 p. m., $25,000.00.

14. H. B. No. 206, appropriated for School of Mines, approved April 13, 1899, 2:30 p. m., $60,000.00.

15. H. B. No. 207, appropriated for University, approved April 13, 1899, 2:30 p. m., $110,000.00.

16. S. B. No. 152, appropriated for Agricultural College, approved April 13, 1899, 2:30 p. m., $15,000.00.

EMERGENCY CLAUSE OMITTED.

17. S. B. No. 30, appropriated for Colorado Volunteers, Spanish-American War, approved April 6, 1899, 12:30 m., $2,500.00.

18. H. B. No. 100, appropriated for W. L. Gilbert, relief, approved April 13, 1899, 10 a. m., $900.00.

19. H. B. No. 91, appropriated for Grand county fish hatchery, approved April 14, 1899, 1:45 p. m., $2,500.00.

20. S. B. No. 10, appropriated for certificate of indebtedness, approved April 18, 1899, 5:30 p. m., $555.00.

21. S. B. No. 395, appropriated for L. S. Jones, relief, approved April 19, 1899, 2:25 p. m., $3,000.00.

The records of your offices show that the revenues of the biennial period of 1899-1900 were not sufficient to meet the current expenses of the government. The foregoing appropriations, therefore, were not available. The current expenses of the institutions to which any of those appropriations refer were met by deficiency certificates. Those deficiency certificates have been taken care of by the special appropriation of the Fourteenth General Assembly, found on page 103 of the Session Laws of 1903. Therefore, while debts are created against some of the foregoing appropriations, yet these liabilities have been cared for by the appropriation of 1903; moreover, where no indebtedness was created against the appropriation, it expired at the end of the biennial period. An appropriation only survives a biennial period for which it was made for the purpose of paying debts contracted against it during the biennial period. After that time has expired, an appropriation which was not available within the biennial period, is not liable to any debt to be created against it after the expiration.

This criticism, however, does not apply to a relief bill, such as is embraced in items 18 and 21. The difference is this: The indebtedness and responsibility of the State had already been incurred before the appropriation was made; the duty of appro-

priating money to relieve the person already existed; therefore, when money comes into the fiscal years out of which that appropriation is to be made, such money must be first pledged to the payment of that relief, or liability.

But, in the other case to which I have referred, no liability existed and no debt was created during the biennial period, or previous to the appropriation. None can be created after the expiration of the biennial period.

So that you will consider these appropriations as dead, and you have only to deal with certificates of indebtedness and the moneys belonging to the fiscal years 1899-1900, after paying items 18 and 21, should be carried into the general fund for the succeeding years in the order of succession. If any liabilities exist against the specific appropriation of 1901-1902, you ought to pay them. The balance will become a surplus of 1901-1902, and, under the appropriation of the Fourteenth General Assembly, will become liable for the deficiency certificates.

If there are any specific appropriations of 1901-1902 unpaid they should be first paid before you consider a surplus available for the payment of certificates of indebtedness, and I consider this course wise, for, if a different construction be adopted, it could only lead to these specific appropriations remaining unsatisfied and will require special legislation from some future Legislature. Besides, it is a departure from the regular and uniform practice of your departments.

I understand the surplus of 1901-1902 and 1903-1904 to mean the money remaining over and above what is required to meet the liabilities which were incurred in those fiscal years. The liabilities of those particular years are to be paid first before you are to consider the balance as existing for the purpose of the surplus fund mentioned in the act of 1903, at page 103.

I wish to call your attention especially to 18 and 21, which are relief bills for W. L. Gilbert and L. S. Jones, respectively.

Ordinarily, the sufficiency of a relief bill can not be determined upon the face of it. You must go behind the bill and find out what the facts are. Some of them are good and some of them are bad. Therefore, it will be necessary for you to inquire into the facts before you issue vouchers for them.

Respectfully,

N. C. MILLER,
Attorney General.

## APPROPRIATION FOR DEPENDENT AND NEGLECTED CHILDREN.

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**The appropriation for the State Home for Dependent and Neglected Children is of the second class.**

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Denver, Colo., June 27, 1903.

HON. WHITNEY NEWTON,
Treasurer of State,
Capitol.

Dear Sir—In regard to your inquiry as to the classification of appropriations for the State Home for Dependent and Neglected Children, I would say that to answer this it is necessary to construe the act regulating the payment of appropriations, found in Session Laws of 1897, page 21, and the amendment thereof in Session Laws of 1899 at page 21, and also the act establishing the State Home, approved April 10, 1895, found in 3 M. A. S., section 422a to section 422s.

The act of 1897 regulating the payment of appropriations in the case that the available revenues of the state for any fiscal year are insufficient to meet all the appropriations made for such year, divided the appropriations into five classes.

It is apparent from an inspection of this act that the appropriations for the maintenance and support of the State Home for Dependent and Neglected Children must fall within either the second or third classes. These two classes are as follows:

"Second. Appropriations for all institutions such as the Penitentiary, Insane Asylum, Industrial School and the like, wherein the inmates are confined involuntarily, shall be next paid.

"Third. Appropriations for educational and charitable institutions."

It is this third class that was amended by the act of 1899, providing for a pro rata distribution in the case of a deficiency to pay in full all of the appropriations under this classification.

It will be seen, therefore, that it is necessary to determine whether the State Home for Dependent and Neglected Children is an institution wherein the inmates are confined involuntarily. If it is, then the appropriation for its maintenance and support falls within the second class, and if not, it is an educational or charitable institution, and falls within the third class.

It therefore becomes necessary to examine the act establishing the State Home for Dependent and Neglected Children to

determine whether it is an institution wherein the inmates are confined involuntarily.

The act establishing the Home, in the first section thereof, defines it as "an institution," and our Supreme Court says of it: "It is now an established institution of the State." Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 101.

A reading of this act will show that while it is not an institution wherein the inmates are confined involuntarily, in the sense that they are committed to it by reason of the conviction of any criminal offense, yet it requires for the commitment of a child to the institution that the County Commissioners of the County wherein the child is, shall file a petition in the County Court, stating that in their opinion the child is dependent on the public for support, is under the age of sixteen years, sound in mind and body, and has no parent against whom its support can be enforced as provided by law, and certain other facts, upon the filing of which petition, certain proceedings are required to be had before the court, and witnesses examined, and if the court, after hearing such evidence, finds that the child is dependent on the public for support, or is neglected or maltreated, or has not a suitable home, the court is required to enter such finding by a proper order, certifying that the child is entitled to admission to the State Home, and ordering that it be sent to the Home by the County Commissioners and admitted therein.

It is also provided that on the entering of such an order, the parents or guardians of the child shall have no further duties toward, or responsibility for such child, and shall thereafter have no rights over or to the custody, services or earnings of such child, except in cases where the Board of the Home, may, as in the act provided, thereafter restore the child to its parents.

There is no provision in the act for the commitment of a child upon its own application, or that of its guardian or parents, so that, from all these provisions, it appears to me that the reasonable interpretation of the act is that it is such an institution as is entitled to the payment of the appropriations for its maintenance and support as of the second class, under the act of 1897.

Yours respectfully,

N. C. MILLER,
Attorney General.

## APPROPRIATION, CHARLES S. COOPER.

**Unpaid clerk hire of State Land Board for prior years is an executive expense, and constitutes a first-class claim, and the General Assembly has power to appropriate for the same.**

Denver, Colo., November 20, 1903.

HON. JOHN A. HOLMBERG,
Auditor of State,
State Capitol.

Dear Sir—I have referred to me an act appropriating money to pay Charles S. Cooper for money paid for clerk hire in office of State Board of Land Commissioners. The act reads:

"There is hereby appropriated out of any money in the treasury, not otherwise appropriated, the sum of nine hundred dollars ($900) to pay Charles S. Cooper for money advanced to pay for clerk hire in State Land Office from May 1, 1897, to February 1, 1899."

Session Laws 1903, page 54.

The clerk hire of this board properly belongs to appropriations of the first class. Any money laid out to pay for clerk hire for conducting the business of that department should have been cared for in the general appropriation bill. The department is created under the Constitution and it is clearly an executive expense. If the Fourteenth General Assembly deemed it proper and expedient to reimburse Mr. Cooper for money expended by him for clerk hire in the conduct of the business of that department, then it found that the general appropriation bill of that year was short and deficient in the amount appropriated for clerk hire, and in reimbursing Mr. Cooper it only makes good that which it omitted to provide for at the proper time.

I am of the opinion that the revenues of each biennial period are devoted to the payment of the expenses originating within that period, according to the proper classification, but I am also of the opinion that Mr. Cooper should be paid out of any revenue for the years 1897, 1898, 1899, 1900, 1901 and 1902, that are now in your hands and not yet disbursed in the payment of any other expenses. His appropriation being for an executive expense has the first claim upon the revenues of those years, and I would, therefore, advise the payment of the appropriation.

Yours truly,
N. C. MILLER,
Attorney General.

## APPROPRIATION.

Index—General appropriation.

Syllabus—The title of the general appropriation bill should embrace nothing but the appropriation for the ordinary expenses of the executive, legislative and judicial departments of state, interest on public debt and for public schools.

Denver, Colo., May 1, 1903.

HON. JOHN A. HOLMBERG,
Auditor of State,
Denver, Colorado.

Dear Sir:—I have your inquiry concerning the title of the general appropriation bill of the Thirteenth General Assembly. The title of that bill reads as follows:

"An act to provide for the ordinary and contingent expenses of the executive, legislative and judicial departments of the State for the fiscal years 1903 and 1904, and to create a State Auditing Board, with certain duties herein prescribed with reference to the disbursement of the contingent fund, and the regulation of the hours of employment, and services of the different employes thereof."

The Constitution, concerning the general appropriation bill, reads as follows:

"The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the State, interest on the public debt, and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject."

I think that nothing can be clearer than that all matters contained in the general appropriation bill, aside from the appropriation for ordinary expenses of the departments mentioned, are improperly included.

The constitution of this Auditing Board is of a very doubtful nature, and I would therefore caution you that in the payment of moneys you act largely upon your own discretion and judgment as State Auditor.

The evil of creating new departments which do not properly belong to the executive, legislative or judicial departments, within the statutory provisions of those terms, is a growing abuse which the institutions of the third class must, sooner or later, protest against, because the increasing size of this general appropriation is acting injuriously to the institutions of the State, especially those of the third class. All those bureaus and departments customarily provided for by the general appropriation bill belong to

the fourth class, under the legislative act of 1897. Their expenses are not the ordinary expenses of the executive, legislative and judicial departments and they have no right in the bill; yet, the aggregate expense of these bureaus and departments is more than $150,000 for the biennial period.

It is only a question of time until the institutions of the third class will bring some suitable action to prohibit the payment of moneys to these departments out of the general appropriation fund. I think, however, that you will be protected in the payment of such moneys under the general appropriation bill, until such action is brought, and would therefore advise that you do not embarrass the operation of such departments and bureaus by raising the point yourself.

Yours truly,

N. C. MILLER,
Attorney General.

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## ASSESSORS COLLECT FOR PREMIUM ON BOND.

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**County treasurer should repay county assessor amount paid on his bond, given under section 42, chapter 3, S. L., 1902, provided it is within statutory limit, and county treasurer may then deduct it from funds remitted to State Treasurer.**

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Denver, Colo., June 16, 1904.

A. D. ARCHULETA, ESQ.,
Treasurer Archuleta County,
Pagosa Springs, Colorado.

Dear Sir—I am in receipt of a letter from Mr. H. J. Bostwick, your county assessor, requesting me to write you in reference to your paying the premium on his official bond as assessor, given under and by virtue of section 42 of chapter 3 of the Session Laws of 1902, and would say that by the last paragraph of said section, you should repay the amount paid by Mr. Bostwick for such surety bond and deduct the same from the funds in your hands belonging to the State, as it appears that the amount of the bond is $2,000, and that the premium of $10 does not exceed one-half of one per cent. per annum on the amount thereof, as limited by statute. The receipt given by the assessor, Mr. Bostwick, for the repayment to him by you of the amount of the premium will be your voucher to the State Treasurer.

The portion of section 42 above referred to is as follows:

"In case the amount of such bond or obligation does not exceed the sum of fifty thousand dollars, the cost of (or) expense

of furnishing such bond or obligation shall not exceed one-half of one per cent. per annum on the amount thereof. In case the amount of such bond or obligation shall exceed fifty thousand dollars, then the cost of furnishing such bond or obligation shall not exceed one-half of one per cent. on fifty thousand dollars of said amount, and shall not exceed one-quarter of one per cent. of the amount thereof in excess of said fifty thousand dollars; provided, that such sum paid for such surety bond shall be repaid to each assessor by the treasurer of the county, and deducted from any funds in his hands belonging to the State."

I am sending a copy of this opinion to Mr. Bostwick at his request.

Yours truly,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

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## SPECIAL MEETINGS BOARD INSANE ASYLUM.

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**A majority of the board can act. The meetings must be held at the asylum, unless otherwise agreed by entire board. Special meetings may be held at asylum upon proper notice to members.**

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Denver, Colo., July 9, 1903.

DR. W. W. GRANT,
Commissioner Asylum for Insane,
Denver, Colorado.

Dear Sir—In reply to your letter of the 20th inst. asking for an opinion as to whether special meetings of the board can be held elsewhere than at the State Asylum, I beg to reply as follows:

1. The statute does not provide any other place for holding meetings than at the State Asylum.

Session Laws 1899, page 258, section 3.

2. The rule appears to be well settled that the entire board must act unless the statute authorizes a majority to do business. This authority must be either by express grant, or by implication.

People v. Lothrop, 3 Colo., 428, 457.
Williams v. School District, 21 Pick., 75.
Swanbeck v. People, 15 Colo., 64.
Throop on Public Officers, Sections 105 and 107.

Section 3 of the act of 1899 provides:

"If any commissioner shall fail to attend the regular meetings of the board for a period of one year after his appointment, his office shall thereby become vacant, and shall be so declared by a resolution of the board, and a certified copy of such resolution shall forthwith be transmitted by the board to the Governor, who, thereupon, shall fill the vacancy by appointment."

It does not seem probable that the Legislature intended the meetings of the board, for a period of one year, to be of no force and effect on account of the absence of one of the members.

Throop on Public Officers, Section 110, states:

"However, in order to enable a majority to act, without a meeting of all, or notice of such a meeting to the minority, it is not necessary that the statute should expressly confer such a power; it suffices that the power may be reasonably inferred from the provisions of the statute, or the nature of the power conferred."

And Section 111 of the same work states:

"Obviously the rule which requires all the members of a body exercising powers of a public nature to meet before the majority can perform any valid official act must often lead to delay and inefficiency in the transaction of the public business. This inconvenience is often obviated by a statutory provision enabling a majority to act; and with reference to corporations, including municipal corporations, the English authorities relax the strictness of the rule by allowing a quorum, or a majority of the whole number of the governing body, to act at a stated meeting of the body, where all are bound to attend, or at a special meeting of which all have had notice."

Section 112 of the same volume says:

"This principle has been applied by some of the American authorities, particularly in the state of New York, to the acts of public officers, and other persons exercising powers of a public nature, where there is no statutory provision in the way of such application, and even where the common law rule, as declared by the English courts, has been substantially embodied into a statute. In the earliest case where this modification of the common law rule was suggested, the court, referring to the three trustees of a school district, said:

" 'There can be no doubt that * * * two could contract against the will of the third, if he was duly notified or consulted and refuse to act.'

" 'And, in a subsequent case in the same State, referring to the same officers, it was said:

" 'The rule of the common law, which is now declared by statute that where an authority is to be exercised by more than one officer, they must all concur in its exercise, or all meet and consult and a majority agree to the act, is subject to the neces-

sary qualification, that if one is notified to attend, and refuses, it is the same as if he had attended and dissented from the act.'

"And this rule is now well recognized by the courts of New York, and by some of the courts elsewhere; and it commends itself for universal adoption by its reasonableness and its tendency to avoid impediments to the transaction of public business."

From these quotations I would judge a reasonable interpretation of our statutes to be that a majority of your board can act; any other conclusion would certainly interfere with public business, and there seems to be sufficient foundation for such intention on the part of the Legislature in the reference made to declaring an office vacant after one year.

On the other hand, I have no doubt that the place of meeting must be the Asylum. Any other construction would allow the Board to choose any place in the State, and this would not be reasonable or just, and I can find no law warranting it. I believe, however, if the entire Board would meet at some other place, the transaction of business would be legal, but that mileage must be computed to the place fixed by law.

I am, further, of the opinion that where a meeting of the Board is called at Denver, and the minority protest and refuse to attend, that the Board can not transact business at such place.

"If the meeting be a special one, the general rule is, unless modified by charter or statute, that notice is necessary, and must be personally served, if practicable, upon every member entitled to be present, so that each one may be afforded an opportunity to participate and vote."

Section 286, Dillon Mun. Corp., 4th Ed.

"Special meetings, properly called according to the rules laid down in the charter, are legal, and the proceedings valid if all the members entitled to be present are properly notified; but notice, it has been held, is not necessary, where every one entitled to it is present at the special meeting of the council."

Tiedeman on Mun. Corp., section 97.

Mechem on Pub. Officers, section 572.

When the mode of procedure is not prescribed by statute or charter, the Board may make reasonable rules. These rules must not violate manifest maxims of justice; therefore, they must provide for notice of time, place and purpose of special meetings, and I am of the opinion that if the regular place of meeting is fixed at the Asylum, the Board can not vary this by notice of place of special meeting.

All members of the Board will be presumed to hold themselves in readiness to attend special meetings at the place named in the statute for regular meetings, but the same presumption will not exist as to special meetings.

I am, further, of the opinion that when a Board is created to take charge of the management and conduct of affairs of a State institution, the Board may make reasonable rules of procedure in the absence of any statute fixing them.

Newling vs. Francis, 3 Durnford & East., 97.
In re Long Island R. R. Co., 19 Wend., 36.
Tiedeman Mun. Corp., sections 98 and 99.
State vs. Smith, 22 Minn., 222.

I believe the notice must be served either personally or by mail, and a reasonable time before the meeting.

Dillon Mun. Corp., 262-263 (4th Ed.).

When the procedure is prescribed by statute, the latter must govern. The statute prescribes no rule in this State for special meetings.

Respectfully,

N. C. MILLER,
Attorney General.

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## ESTATE LIABLE FOR EXPENSES OF INMATE OF ASYLUM.

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**Where a lunatic has property, it is the duty of the commissioners of the insane asylum to render an account to the proper county court, that the same may be collected from the conservator.**

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Denver, Colo., October 21, 1903.

DR. W. W. GRANT,
President Board Commissioners of Colorado Insane Asylum,
Denver, Colorado.

Dear Sir—I have your favor enclosing the letter of Hon. Ben B. Lindsey to you, dated September 29th, last, upon a marked portion of which letter you ask my opinion.

The portion marked is a quotation from section 2957 of the 3d volume of Mills' Annotated Statutes, and is as follows:

"If such lunatic has any estate in the hands of his conservator, an account for the keeping of said lunatic shall be rendered by the proper authorities of said asylum or hospital, or to the owner or owners of any other place where he has been treated, to the County Court, by which said commitment was ordered, and, upon the further order of said court, the conservator shall pay said account out of any moneys in his hands belonging to said estate, and which may be lawfully so applied."

I presume you desire me to advise you as to whether your Board can recover pay for keeping a lunatic in the State Asylum who has an estate in the hands of his conservator.

As early as 1868 our statutes provided that where any lunatic has an estate in the hands of a conservator, upon order of the County Court, after an account has been rendered by the proper authorities of the expenses of the keeping of said lunatic, the conservator shall pay the sum out of any moneys in his hands pertaining to such estate, and which may lawfully be so applied.

Section 23, page 445, Revised Statutes of 1868.

2 M. A. S., section 2957.

The act establishing the Colorado Insane Asylum was approved February 8, 1879, and is found in 2 M. A. S., sections 2969-2974.

The early lunacy statutes of this State provided that, upon the finding that any person was insane, it should be "the duty of the court, by an order to be entered of record, to commit such persons to the county jail, or other convenient place, to be there confined until discharged or otherwise disposed of according to law."

2 M. A. S., section 2962.

No express mention was made of the State Insane Asylum until the enactment by the 9th General Assembly of certain amendments to the lunacy statutes, which amendments are found in chapter 119 of the Session Laws of 1893, at pages 331-338.

By that act, power to confine an insane person in the county jail was taken away, except in the extreme cases mentioned therein, and special authority was given to the County Court for the commitment of lunatics to the State Insane Asylum, or other hospital or place suitable for the treatment of insane, and by the same act, the express provision, quoted by Judge Lindsey in his letter to you, was made, providing in case the lunatic had an estate in the hands of a conservator, that, upon rendering of the account therefor by the proper authorities of the asylum or hospital to the County Court, and upon the further order of the County Court, the conservator shall pay such account out of any moneys in his hands belonging to said estate which may be lawfully so applied. This latter provision was, however, but a continuation of the policy requiring the payment for the keeping of any lunatic out of the assets of his estate, if he had any, which policy, as I before said, has been in force in this State since 1868.

I am of the opinion, therefore, that it is not only the right of the Board of Commissioners of the Colorado Insane Asylum to have the expense of keeping any lunatic who has an estate paid out of his estate, but that it is the duty of the Board to

see that the proper account for the keeping of any such lunatic is rendered to the proper County Court which committed the lunatic to the State Asylum; and that such County Court order the conservator to pay the same out of the moneys in his hands belonging to said estate. By so doing, the State will be relieved, as the law contemplated it should be relieved, of the expense of keeping lunatics who have estates ample to pay for their keeping.

In this connection, I may also call your attention to a statute which has been in force in this State since 1868, namely, section 2967 of the 2d volume of Mills' Annotated Statutes, which provides that if, at any time after the payment of an account for the support of a lunatic pauper by the county authorities, it shall appear that such lunatic had, at the time, relatives within the State, bound by law, and of sufficient ability to support him or her, an action shall lie on behalf of the State to recover from such relative all sums of money so expended.

Yours respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

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## HIRAM P. BENNETT, CLAIM OF.

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**Belongs to executive class, and must be paid as a preferred claim.**

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Denver, Colo., November 21, 1903.

HON. JOHN A. HOLMBERG,
Auditor of State,
State Capitol.

Dear Sir—In regard to the claim of Hiram P. Bennett of $4,995.38, due him for services as State Agent, under and by virtue of an act entitled: "An act to provide for the appointment of a State Agent," approved March 31, 1885, and found in Session Laws of 1885, page 328, I would say that Mr. Bennett was appointed by Governor Eaton as such agent under the authority of said act, his commission being dated the 2d day of April, A. D. 1885.

Thereafter, as provided by section 2 of said act a contract was made between the then Governor and Attorney General of the State and Mr. Bennett for his compensation, which contract

is on file in your office. He has been paid heretofore, from time to time, compensation for such services, upon the title to the lands becoming vested in the State, but there now remains due him for services the sum of $4,995.38, as will be seen by the certificates of Governor Orman, to your predecessor, Charles W. Crouter, dated May 28, 1903, and October 22, 1902; said certificates showing that the total sum of $5,063.54 was due Mr. Bennett, of which amount $68.16 was paid on September 19, 1902.

The last session of the General Assembly passed an act appropriating the sum of $4,995.38 to pay Mr. Bennett the balance due him, said sum being appropriated out of any moneys in the Treasury not otherwise appropriated belonging to the general revenue fund; Session Laws 1903, page 27.

By careful examination of the facts, statutes and decisions of our courts I am of the opinion that Mr. Bennett was a public officer and a part of the Executive Department of the State, and that his claim for services is a claim to be classified as of the first class, and should be paid out of any revenue not otherwise appropriated; but I advise that it should be paid out of the revenues prior to the present biennial period.

In support of this opinion I would say, that I find that the District Court of this county some years ago passed upon this very question, during the administration of Hon. John M. Henderson as Auditor of State, which decision of the District Court has never been reversed, although I am informed that Mr. Henderson sought to procure a supersedeas from the Supreme Court, which was denied; but as the case was never docketed in the Supreme Court there is no record there of it.

The opinion was by Hon. George W. Allen, one of the judges of the District Court, of then Arapahoe County, the case being No. 15430, entitled Hiram P. Bennett vs. John M. Henderson, Auditor of State of the State of Colorado.

The opinion is as follows:

"Upon an examination of the papers and the authorities bearing upon the questions presented, we are of the opinion that the petitioner in this case was a public officer. That from his appointment by virtue of the statute and by appointment of the executive, such appointment being confirmed by the Senate, assigning the duties he was to perform, the fact a commission was issued to him by the executive the same as any officer of the State, he was as much entitled to a place in the general appropriation bill, to be paid from the general fund, as any other official of the State whose office was not provided for in the Constitution, but provided by statute, and that the petitioner in this case comes within the rule as announced by our Supreme Court in the opinion in XIII Colo., page 317, 328, wherein the court says: 'Acts of the General Assembly making the necessary appropriations to defray the expenses of the executive, legislative and judicial departments of the State Government for each fiscal

year, including interest on any valid public debt, are entitled to preference over any other appropriations from the general public revenue of the State, without reference to the date of their passage, and irrespective of emergency clauses.'

"I think this a claim that is entitled to preference over any other claim of internal improvements and appropriations of like character made by the Seventh General Assembly and the Eighth General Assembly, and no writ will issue."

Respectfully,

N. C. MILLER,
Attorney General.

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## HIRAM P. BENNETT.

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Mr. Bennett, as State Agent, is entitled to compensation of 5 per cent., valued at $1.25 per acre, and if former appropriation is exhausted another should be made.

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Denver, Colo., March 11, 1903.

HON. R. G. BRECKENRIDGE,
Chairman House Committee on
Appropriations and Expenditures,
House of Representatives,
Denver, Colo.

Dear Sir—I have examined the petition of Hiram P. Bennett, late State Agent, for services performed under his contract with the State.

I have also examined the act of 1885, known as chapter 114, in volume 2, Mills' Annotated Statutes.

I have also examined the act of 1891, appropriating $31,250 to him as compensation for the recovery of five hundred thousand (500,000) acres of school land to the State of Colorado under his contract.

I have also examined the act on page 325 of the Laws of 1891, repealing the act of 1885.

I have also had my attention called to the certificate issued by Governor Orman, certifying to the amount of $4,995.38 due him for additional lands, the title of which has vested in the State since the appropriation of 1891.

In conclusion, I am of the opinion that Mr. Bennett is entitled to compensation at the rate of five per cent. on all land secured to the State valued at $1.25 per acre, and that if he has

exhausted the $31,250 appropriation, he is entitled to such additional appropriation as will cover whatever is due.

Respectfully,

N. C. MILLER,
Attorney General.

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## BOARD OF ARBITRATION.

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**In case of labor troubles the Board of Arbitration may offer its services, and, if accepted, may subpœna witnesses and decide the questions before it, but has no power to compel either employer or employe to enter into arbitration.**

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Denver, Colo., March 13, 1903.

HON. JAMES H. PEABODY,
Governor of Colorado,
Capitol.

Dear Sir—You have asked the opinion of the Attorney General as to what power the Governor possesses, under the arbitration act of 1897, to cause an arbitration of differences between employer and employes.

I will say that the power of the Board of Arbitration is defined by section 5 of the act, which reads as follows:

"That whenever any grievance or dispute of any nature shall arise between employer and employes, it shall be lawful for the parties to submit the same directly to said Board, in case such parties elect to do so, and shall jointly notify said Board, or its clerk, of such desire in writing. Whenever such notification is given it shall be the duty of said Board to proceed with as little delay as possible to the locality of such grievance or dispute, and inquire into the cause or causes of such grievance or dispute. The parties to the grievance or dispute shall thereupon submit to said Board in writing, clearly and in detail, their grievances and complaints and the cause or causes therefor, and severally agree in writing to submit to the decision of said Board as to the matters so submitted, promising and agreeing to continue on in business or at work, without a lockout or strike until the decision is rendered by the Board, provided such decision shall be given within ten days after the completion of the investigation. The Board shall thereupon proceed to fully investigate and inquire into the matters in controversy and to take testimony under oath in relation thereto; and shall have power, under its chairman or clerk, to administer oaths, to issue subpoenas for the attendance of witnesses,

the production of books and papers in like manner and with the same powers as provided for in section 3 of this act."

I consider it almost needless to offer an opinion upon this section, as it is so plain, but will say, in order to cover the question asked, that there is no power under any law, in the State of Colorado, to compel employer and employes to enter into any plan of arbitration.

Section 7 of that act reads as follows:

"That whenever a strike or lockout shall occur, or seriously threaten, in any part of the State, and shall come to the knowledge of the members of the Board, or any one thereof by a written notice from either of the parties to such threatened strike or lockout, or from the mayor or clerk of the city or town, or from the justice of the peace of the district where such strike or lockout is threatened, it shall be their duty, and they are hereby directed, to proceed as soon as practicable to the locality of such strike or lockout, and put themselves in communication with the parties to the controversy and endeavor, by mediation, to effect an amicable settlement of such controversy, and, if, in their judgment, it is deemed best, to inquire into the cause or causes of the controversy; and to that end the Board is hereby authorized to subpoena witnesses, compel their attendance and send for persons and papers in like manner, and with the same powers as it is authorized in section 3 of this act."

If there is any doubt as to the meaning of section 5, it is made clear by section 7. The Board of Arbitration may go to the scene of difficulty and offer their services, but there is nothing whatever in the act which enables them to decide anything or enforce a decision, and, so far as the other side of the controversy is concerned, they do not have to submit any matter in dispute to the Board.

Section 5 gives them the right to investigate, subpoena witnesses and make a decision, but this is only when the matter is voluntarily submitted to the Board.

Respectfully,

N. C. MILLER,
Attorney General.

## CONSTITUTIONAL PROVISIONS CONCERNING THE ELECTION OF COUNTY COMMISSIONERS.

Denver, Colo., August 24, 1904.

HON. P. C. BOYLES,
Secretary Republican Central Committee,
Gunnison, Colorado.

Dear Sir—In reply to your letter of August 20, 1904, I will say that we have made an examination of the law covering your inquiry.

The Constitutional provision making the change in the election of county commissioners is found at page 112 of the Session Laws of 1901. This provision is self executing.

The purpose of the election was to bring the election of county commissioners in harmony with our biennial plan of county and State elections. It was therefore necessary to provide that the commissioner whose term expired the second Tuesday in January, 1904, be extended until the second Tuesday in January, 1905. Then, on the second Tuesday in January, 1905, the second commissioner's term expires under the old law, and this new Constitutional provision does not extend his term, for the obvious reason that it was intended that the term of the two commissioners should expire on the second Tuesday in January, 1905, so that successors could be elected at the November election, 1904. But the Constitutional provision extends the term of the third commissioner. This is the commissioner whose term expires the second Tuesday in January, 1906, and the amendment extends his term until the second Tuesday in January, 1907, for the reason that his successor may be elected two years hence.

In short, it was necessary to extend the term of the commissioner A, in order to make it expire with the term of commissioner B, and then elect the successors of both, and, in order to prevent a vacancy occurring at the expiration of the term of commissioner C in an odd year, it was necessary to extend his term one year. This is the commissioner whose term expires the second Tuesday in January, 1906.

I believe this fully covers your inquiry, and respectfully submit the same.

Yours truly,

N. C. MILLER,
Attorney General.

## BOND OF WARDEN OF PENITENTIARY.

**The bond of the Warden of the State Penitentiary should have the oath of office endorsed on the back.**

Denver, Colo., March 25, 1903.

MR. JOHN CLEGHORN,
Canon City, Colorado.

Dear Sir—In regard to your bond as Warden of the State Penitentiary, submitted by you to me for my opinion under the statutes, together with your oath of office, executed by the American Bonding Company, of Baltimore, Maryland, as surety, which bond bears date of March 24, 1903. I would say that the bond is in proper statutory form, but section 3410, volume 1, M. A. S., requires that the oath of office "shall be endorsed on the back of said bond;" whereas, the oath of office submitted by you is upon a separate piece of paper.

Under section 8, article 12, of the State Constitution, I think that the oath of office, in addition to the matter required by section 3410 above cited, should contain a further oath by you that you will faithfully perform the duties of the office upon which you are about to enter.

I herewith return to you the bond and oath of office for correction in this, that you have the following oath of office endorsed on the back of said bond, and duly executed and sworn to by you:

State of Colorado, City and County of Denver, ss.

I, John Cleghorn, do solemnly swear by the ever living God that I will support the Constitution of the United States and of the State of Colorado; that I will faithfully perform the duties of the office upon which I am about to enter; that I will scrupulously observe all the stipulations and conditions of my bond, and faithfully discharge all of my duties agreeably to law and the directions of the Board of Commissioners, according to the best of my ability.

.....

Subscribed and sworn to before me this.....day of March, A. D. 1903.

My commission expires.....

.....
Notary Public.

Yours truly,

N. C. MILLER,
Attorney General.

By H. J. HERSEY,
Assistant Attorney General.

## CONVICT UNDER PAROLE, MARRIAGE OF.

A prisoner of the State Penitentiary, out on parole, can enter into the marriage contract.

Denver, Colo., August 20, 1903.

STATE BOARD OF PARDONS,
Denver, Colorado.

Gentlemen—I am in receipt of the following inquiry, under date of August 15th:

Can a prisoner of the State Penitentiary, out on parole, lawfully enter into the marriage contract?

The chief importance attaching to this is the validity of the marriage relation and the legitimacy of the children born.

The matter seems to be fully passed on in the case of

Avery vs. Everett, 110 N. Y., 317; also, 6 Am. St., 368.

My notion is that there is nothing to prevent the marriage of a prisoner out on parole. The marriage is legal, and any children born will be legitimate.

Respectfully submitted,

N. C. MILLER,
Attorney General.

## CAMPING OUT.

Persons desiring to camp outside of counties in which they legally reside must get permit from the clerk of their own county.

Denver, Colo., July 27, 1903.

HON. GEORGE HETHERINGTON,
County Judge,
Gunnison, Colo.

Dear Sir—Replying to yours of the 22d inst., requesting my construction of section 11 of the Forestry Act, found in Session Laws of 1901, page 185, et. seq., I would say that the section referred to is as follows:

"No person, party or parties, shall be allowed to camp, either for business or pleasure, in any forest district of this State outside the county in which they legally reside, without first taking out a permit so to do. Such permit shall bear such part of this act as relates to fires and their care and shall be issued by the clerk of any County Court within the State upon the payment of the sum of fifty cents as a fee. Permits must at all times be produced and shown to any game or forest warden, land appraiser, constable, sheriff or other official empowered by law to demand the same, and such permit may be taken up by such warden, land appraiser or other official whenever the holder thereof shall willfully violate the provisions of this act."

It will be seen that, by the plain interpretation of the act, this section authorizes the issuance of a camping permit allowing any one to camp outside of the county in which he legally resides, "by the clerk of any County Court within the State," upon the payment of the prescribed fee.

A construction of this section requiring campers to procure a permit from the clerk of the County Court in each county where they happen to camp would impose an unnecessary burden upon such persons in the multiplication of fees which is not evidently contemplated by the act, the evident purpose of the act being to prevent the destruction of our forests by fires, etc., and as a means to that end to require persons desiring to camp in counties outside of that county where they legally reside to take out a permit from some county court, being, as it were, a sort of guaranty of good character and responsibility; one permit accomplishes this as well as two or more.

The same section also requires that permits must, at all times, be produced and shown to any game or forest warden, land appraiser, constable, sheriff, or other official empowered to demand the same, and also that the permit may be taken up by any such official in case of wilful violation of the act by the holder thereof.

The usual and reasonable requirement of publicity in cases of permits or licenses is naturally fulfilled in this by the above-mentioned provision relating to the production of the permit to officers upon demand.

As the officials above named are charged with the enforcement of the law, with power to arrest with or without warrant, all violators, I do not see, if such officers do their duty, which it must be presumed they will do, that there is any probability of the law becoming "an absolute nullity," as you suggest.

I heartily concur with you that all possible means must be taken to prevent the recurrence of forest fires, but for this the State must rely upon "the game and forest wardens, the land

appraisers and all peace officers of the State," charged by section 13 of the act, with its enforcement.

Yours respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

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## CERTIFICATES OF INDEBTEDNESS.

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**The certificates of indebtedness issued for the payment of the militia employed in the suppression of insurrection in Teller and San Miguel counties, and other places in the State, are valid, and will draw interest at the rate of 4 per cent. per annum until paid by an appropriation of the legislature.**

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Denver, Colo., April 7, 1904.

HON. JAMES H. PEABODY,
Governor of Colorado,
State Capitol.

Dear Sir—In reply to your request for an opinion concerning the validity of the certificates of indebtedness issued for the payment of the soldiers and expenses incurred in the suppression of insurrection at Teller and San Miguel counties and other places in the State, I desire to state as follows:

The provision of the Constitution under which the troops have been called out is as follows:

"He shall have power to call out the militia to execute the laws, suppress insurrection, or repel invasion."

Section 5, Article IV, Colorado Constitution.

All the proclamations and orders necessary for the calling out of the troops to carry out the foregoing provision have been issued by you, and, therefore, the troops are properly in the field, and expenses incurred by them are legal. They are in the service of the State under your orders.

Sections 10 and 12 of the act of 1897, concerning the National Guard, provide for the payment of the militia when in the service of the State. Section 10 provides that:

"The officers and enlisted men who are serving under the orders of the Governor, sheriff, mayor or judge, to prevent violation of the law of the State, or to prevent or suppress riot or

insurrection, etc., shall until such time as other provision is made for the payment of the services rendered, receive pay out of the general fund of the State at the following rates."

Section 12 provides that:

"Payments under the preceeding sections shall be made by the Inspector General; no voucher for any such payments shall be audited unless certified as correct by the proper officer and passed upon by the State Military Board."

No appropriation shall be made, nor any expenditure authorized, by the General Assembly, whereby the expenditures of the State during any fiscal year shall exceed the total tax then provided by law and applicable for such appropriation or expenditure, unless the General Assembly making such appropriation shall provide for the levying of a sufficient tax not exceeding the rates allowed in section 11 of this article, to pay such appropriation or expenditure within said fiscal year. This provision shall not apply to appropriation or expenditures to suppress insurrection, defend the State, or assist in defending the United States in time of war.

Section 16, Article X, Colorado Constitution:

"In all cases where the laws recognize a claim for money against the State, and no appropriations shall have been made by law to pay the same, the Auditor shall audit and adjust the same, and when the said claim shall have been approved by the Governor and Attorney General, he shall give the claimant a certificate of the amount thereof under his official seal if demanded, and shall report the same to the General Assembly, with as little delay as possible, giving a statement in tabular form of the number, date of issue and amount of each certificate, and for what purpose issued. No indebtedness shall be incurred or certificate of indebtedness issued for any purpose for which an appropriation has been made and exhausted, unless the necessity for the creating of such indebtedness and the issuing of such certificate is caused by a casualty happening after the question of incurring such indebtedness shall be first submitted to the Governor and Attorney General, for their approval."

1 M. A. S., section 1829.

In conclusion I have to say that all the conditions have been complied with, necessary to the issuance of a valid certificate of indebtedness for the payment of the military, and its expenses while in the service of the State have been audited by the Military Board.

There is no appropriation to pay them, and the necessity for this indebtedness grows out of an unforeseen casualty, and therefore comes strictly within section 1829, above quoted.

It only remains for the Legislature to provide for their payment by making an appropriation, or otherwise providing for

the same. Until they are paid, they draw interest at the rate of four (4) per cent. annually.

Yours respectfully,

N. C. MILLER,
Attorney General.

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## HOUSES OF CORRECTION—SCHOOLS.

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**The children in houses of correction and other places of confinement for incorrigible children must be cared for by the State, and are not part of the common school system, and therefore entitled to none of its school fund.**

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Denver, Colo., September 21, 1903.

HON. HELEN L. GRENFELL,
State Superintendent Public Instruction,
State Capitol.

Dear Madam—I have considered the following letter submitted to you by C. E. Hagar, secretary of the State Board of Charities and Correction:

"At the postponed regular meeting of the State Board of Charities and Correction held Wednesday afternoon, September 9, 1903, I was instructed to request from you information in relation to the question whether children of school age in custody of the State of Colorado in its several State institutions are entitled to a share of the school fund of this State, and if so, what steps should be taken to obtain the same. The board desires further, if it shall be found that these children are entitled to such portion of the State school fund, to know whether the teachers employed to instruct these children must possess a teacher's certificate from the proper State or county authorities."

I beg leave to report in reference to said inquiry as follows:

The school fund of the State, apportioned to the several counties by you, is derived from the following source:

"The sections numbered 16 and 36 in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other than land equivalent thereto in legal subdivisions of not more than one-quarter section, and as contiguous as may be, are hereby granted to said State for the support of the common schools."

Sec. 7 Enabling Act, p. 92, Mills.

This provision alone probably settles your question without further discussion. This section has been construed invariably

by our courts, and by this office, as creating a trust fund in the hands of the State.

The beneficiary is the common school, and our legislature has passed some statutes in furtherance of the trusts. These are to be found in the School Laws of 1901, under Sections 72, 73, 74 and 75. Also reference is made to Section 19 of said laws.

The fund, therefore, belongs exclusively to the school districts of the State of Colorado, which are a legal subdivision of the government. The funds, therefore, belong to the school districts of the State, as being a legal organization of the common schools. The apportionment of the funds to the counties, to be thereafter distributed among the school districts per capita is only a wise and salutary one, measuring the equitable portion of the fund which should be paid to each school district.

What Congress and the State had in mind is an institution to educate children. Houses of correction and other places of confinement for incorrigible children are State institutions and must be cared for by the State. They do not belong to the common school system of our State.

The residence of the parents controls the residence of the children. If the State passes a law authorizing the confinement of incorrigible children, such place is an institution of involuntary confinement. The inmates of such place should be enumerated where their parents reside. Orphans confined in such an institution do not gain a residence at its situs. It is a familiar rule of law that inmates of institutions of involuntary confinement do not gain a residence by being domiciled at such place. Inmates of such institutions, therefore, are not to be enumerated as a part of the school district where such house is located.

In reference to the home for dependent and neglected children, I am convinced that the solution of their enumeration is to be solved on elementary principles of law. Among these is the right of a person, whether rich or poor, to establish a home in any school district. In case the parents are dead, the common law right of the State to step in and exercise the relation of parent to these children carries with it the same right of this legal parent to place the home of such children where it deems most advisable. Such children are not inmates of an institution of involuntary confinement. They are in a home provided by the State, which then stands in the relation of a parent. They are as much entitled to the privileges and advantages of our common school system as are any other children whose natural parents are in existence. They are, therefore, to be enumerated in the district in which said home for neglected and dependent children is situated.

I believe this covers the questions raised in the inquiry of the secretary of the Board of Charities and Correction, and I beg leave to submit the same as my conclusion as to the law covering it.

Respectfully,

N. C. MILLER,
Attorney General.

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## OFFICIAL TERM OF CONSTABLE.

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In re termination of office of constable, under constitutional amendment adopted in 1902.

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Denver, Colo., October 2, 1903.

MR. FRANK LOMISTER,
County Clerk,
Leadville, Colo.

Dear Sir—In answer to your inquiry concerning the tenure of the office of constables under the constitutional amendment adopted in 1902, and found on page 112 of the Laws of 1901, section 11 provides that there shall be elected at the same election at which members of the General Assembly are elected, beginning with the year 1904, two justices of the peace and two constables. This constitutional provision repeals section 11, article XIV of the Constitution. Further on, this section provides that the term of all justices of the peace which expires in January, 1904, is hereby extended to the second Tuesday in January, 1905. The omission to include in this section the office of constable was unintentional, but the result is just the same, because we can not interpolate into this section what should have been included, and which was thoughtlessly omitted.

I refer you to the decision in relation to county treasurers, found in volume 9, Colorado Reports, at page 631. The court, in that case, held that the office of treasurer terminated at the expiration of the old term, as defined by the old act, and that the new term did not begin until the point of time fixed by the new act. The Supreme Court held that the office, during the interim, should be filled by the county commissioners, under section 9, article XIV.

This opinion does not conflict with vacancies existing in office created by death, resignation, or removal from the State.

Another and different constitutional provision provides that such vacancies shall be filled by appointment to continue until the next general election. This constitutional provision has not

been changed by the amendment of 1902. The only question to discuss is in reference to the election this fall being a general election. Our office has held that it is a general election, and that such vacancies must be filled by election in November. I refer you to section 7, article VII, and to section 9, article XIV, of the Constitution.

My conclusion is that where an office expires by limitation, the law fixing the time that a vacancy exists, it must be filled in some constitutional manner. In this instance it can not be filled by election, because section 3 of the amendment of 1902 dispenses with the election of county officers whose term of office expires by limitation on next January. This constitutional amendment makes it clear that an election can not be held for county officers whose terms so expire, but the amendment is not in conflict with section 9, article XIV, which provides for appointments to fill vacancies caused by death, resignation or removal from the State. When these vacancies are filled by appointment the Constitution is equally explicit that the tenure shall last only until the next general election. I am of the opinion that the election this fall is a general election.

Yours truly,

N. C. MILLER,
Attorney General.

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## CONTRACTS FOR SUPPLIES.

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**The law demands that all purchases be made under contract, and the Board of Equalization has the authority to pass a resolution directing the purchasing agent to require the different departments and bureaus to select supplies under the contract.**

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Denver, Colo., May 20, 1903.

HON. JAMES H. PEABODY,
Governor of Colorado,
State Capitol.

Dear Sir—I am in receipt of your communication asking an opinion as to the authority of the purchasing agent in procuring supplies for the executive, legislative and judicial departments, bureaus and branches.

First—So far as these supplies are paid for out of the contingent fund, the purchase of them is within the control of an auditing board, composed of the Governor, Auditor and Attorney General. The purpose of appointing this board is to secure a economical expenditure of the contingent fund. Its powers,

therefore, are more than ministerial, and I am of the opinion that they are clothed with a very broad grant of authority; so much so, indeed, that I believe they can dictate the quality, quantity and character of the supplies. I would, therefore, advise that this board pass a resolution, directing that the purchasing agent require of the executive, legislative and judicial officers, heads of bureaus and branches to comply with the law, which demands that purchase be made under contract.

Therefore, the Secretary of State makes a contract in the first instance containing the selection, varieties and qualities of the various articles at a specified price. He is the designated officer, so he acts for all departments. It is the duty of the auditing board thereafter, to see that all requisitions shall be filled with articles which come within the express terms of the contract contained in the Secretary's office. Specials should not be allowed by the board, nor purchased by the Secretary or his subordinates. The same rule holds true with the printing, which is secured by the Supervisor of Printing.

I am impelled more to this conclusion by the necessities of the present administration, on account of the small contingent fund granted this administration. After the payment of the printing it leaves only $50,000 for the twenty months of this administration, which would be $2,500 a month for all departments. It will, therefore, require the utmost economy, care and administrative ability on the part of the purchasing agent of the Secretary's office, and of the Supervisor of Printing to get through this administration upon the allowance.

I, therefore, believe that the auditing board should enter an order, and ask the secretary of the committee to forward it to all the departments, and instruct the purchasing agent and Supervisor of Printing to adhere strictly to the purchase of articles only under contract.

It is oftentimes suggested that the article desired and listed on the contract does not meet the taste and approval of the particular department requiring it. In answer to this, I believe I can safely say that, in matters of stationery, a sufficient variety is always offered, while it is very easy for the furnishing house to suggest something, not any better, but, outside of the contract, and thus require the State to pay for it at special prices, while, if the department securing it would only investigate what the contract entered into would furnish at a reduced price, I am sure they would be as well satisfied as to follow the suggestions of the furnishing house.

At any rate, I am fully satisfied that the auditing board has authority to correct this abuse, and, in doing so, should enter an order.

Yours respectfully,

N. C. MILLER,
Attorney General.

## COUNTY JUDGE—COMPENSATION OF.

**Compensation of county judges of counties of the fifth class paid from fees only.**

Denver, Colo., January 5, 1903.

HON. JAMES H. PEABODY,
Governor of Colorado,
State Capitol.

Sir—Replying to your letter of the 4th inst., enclosing letter from the Hon. Smith Frey, county judge of Sedgwick county, requesting an opinion as to compensation due him as such county judge, I woud say that the section of the statute he refers to is section 1936p of the third volume of Mills' Annotated Statutes, which section was, in 1889, amended (see pages 333 and 334, Session Laws 1889). The provision in reference to fixing the minimum compensation of county judges at $500 per annum is not in the amendment, so that under the existing law there is no minimum salary, but, instead, a maximum salary of $1,000 per annum for a county judge of a county of the fifth class, in which class Sedgwick county is, but, by the express provision of the amendment above referred to, such salary is to be paid out of the fees and emoluments, "and not otherwise." So that if the fees and emoluments amount to less than $1,000 per annum, the county judge receives such amount, whatever it may be.

Respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

## JURISDICTION OF COUNTY COURT.

It is the duty of the warden of the Colorado State Reformatory to hold all persons of proper age sentenced there from the County Court under the juvenile law.

Denver, Colo., May 9, 1904.

MR. A. C. DUTCHER,
Warden Colorado State Reformatory,
Buena Vista, Colorado.

Dear Sir—In reply to your inquiry of May 4th, 1904, as to whether a County Court has jurisdiction of felonies, I beg to say that upon inquiry I find that one of the district judges in this judicial district has so held; so that under the circumstances I think your duty would be to hold all persons of proper age sentenced to your Reformatory the same as if there was no question concerning such legality, thus allowing them to test the matter in the higher courts by habeas corpus, as any other action upon your part would deprive the State of a review, and thus the question would never become definitely settled.

Yours truly,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

## FOREIGN CORPORATIONS.

A foreign corporation can not operate mines in Colorado without filing articles of incorporation and complying with the corporation laws.

When the Secretary of State discovers a violation of these laws by a foreign corporation, he should cause action to be brought, stopping it from doing business.

Denver, Colo., July 27, 1904.

HON. JAMES COWIE,
Secretary of State,
State Capitol.

Dear Sir—I have a communication addressed to you from W. E. Mead, concerning an alleged violation of the corporation

laws of Colorado by The Oakland Gold Mining & Milling Company, organized under the Wyoming laws.

The substance of the complaint is as follows:

"Parties organized The O. G. M. & M. Co. within two years on Ward properties. It is a Wyoming incorporation, and it is being operated and stock being sold in Colorado without paying Colorado either any flat tax or incorporation fees."

There are substantially four allegations in this:

1. The company is organized to operate mining property at Ward, Colorado.

2. It is selling stock in Colorado.

3. It has not paid any fee for admission to do business in Colorado.

4. It has not paid the annual State corporation license tax.

In reply to your inquiry, I will say that it has not the power to do the first, third and fourth without complying with the laws of Colorado. As to the second, it may sell stock without complying with the laws of Colorado.

I desire to call attention to sections four and five, pages 118 and 119, Session Laws 1901. If you find representations in this letter to be true, proceedings should be commenced to stop this company from doing business.

Yours truly,

N. C. MILLER,
Attorney General.

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## INCREASE OF CAPITAL STOCK.

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A foreign corporation, having increased its capital stock subsequent to filing its original certificate or articles of incorporation, is required to pay the fees provided by section 5, chapter 52, Laws of 1901.

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Denver, Colo., February 20, 1903.

HON. JAMES COWIE,
Secretary of State,
Denver, Colorado.

Dear Sir—You have asked the opinion of this department on the following proposition:

"A corporation was organized in 1884 for $200,000.00; its articles were filed 1892; July 18, 1898, its capital stock was increased $2,800,000.00; the annual report which the Revenue Act

requires to be filed, discloses the above facts, and the company now asks to file a certificate of its increased capital stock, and your interrogatory goes to the question as to whether it shall pay the thirty cents per thousand dollars of increased capital stock, as required by section 5 of the Act of 1901, approved April 6, 1901."

Any foreign corporation which, since the filing of its certificate in this State, has increased its capital stock without paying the fees prescribed by the law of this State at the time of such increase, or which shall hereafer increase its capital stock, shall be liable to pay the fees prescribed by this act. You are therefore required to collect the fee prescribed by the Act of 1901, which is thirty cents per thousand dollars in the case of foreign corporations.

The law explicitly states that, in the event the corporation has failed to pay the fees prescribed by the law at the time of the increase, it shall pay under the Act of 1901.

Yours truly,

N. C. MILLER,
Attorney General.

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## FOREIGN CORPORATIONS.

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**Foreign corporations, although engaged only in commercial business, must file their annual report, under section 23 of the Revenue Law of 1902.**

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Denver, Colo., May 2, 1903.

HON. JOHN A. HOLMBERG,
Auditor of State,
State Capitol.

Dear Sir—In reply to your letter of May 1, 1903, enclosing me communication from Hon. Charles E. Kilmer of New York City, representative of the Grand Union Tea Company, a foreign corporation, I beg to reply as follows:

Mr. Kilmer's contention is that his client, being a foreign corporation engaged in only commercial business in Colorado, is not properly required to file an annual report with you under the provisions of section 63 of the Revenue Act of 1902.

In reply to this contention I wish to say that the purpose of these reports is to enable the State to obtain information concerning corporations doing business in two or more counties so as to enable the counties to tax the franchise and properly apportion it between the counties.

This report is necessary in all the items, and Mr. Kilmer wishes to exclude those necessary to arrive at the value of the franchise.

The act provides that where the corporation does business outside of the State, the value of the franchise to be taxed in the State of Colorado shall be such part of the value of the entire franchise as the tangible property in the State bears to the total value of the tangible property of the corporation.

It would serve no purpose to urge the legitimacy of requiring foreign corporations to do business in the State of Colorado upon such conditions as the State imposes. I might say incidentally that these inquiries are no more searching than in the case of banks or insurance companies. It is a mistaken notion that any corporation is so identified with the individuals who own it that it has any intrinsic right to escape investigation.

Respectfully,

N. C. MILLER,
Attorney General.

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## IMPRESSION OF CORPORATE SEAL.

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**A certificate of right to do business should not be issued until all fees are paid, including fee for filing impression of corporate seal.**

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Denver, Colo., January 29, 1903.

HON. JAMES COWIE,
Secretary of State of Colorado,
Denver, Colorado.

My Dear Sir—In reply to your question submitted to this office as to whether you shall exact a fee of $2.50 for filing and recording impression of corporation seal where the same is impressed upon the certificate of incorporation and referred to in the body of the instrument and signed by the incorporators, it is my opinion that you must collect the fee.

There does not seem to be any statute in the State of Colorado that refers to the filing of impression of corporate seal in the first instance, but under M. A. S., section 476, the law provides:

"Corporations formed under this section shall be bodies corporate and politic in fact and in name, by the name stated in such certificate, and by that name have succession for the period for which they were organized; may, in any court of law or equity in this State, sue and be sued, may have a corporate seal which

they may alter or renew at pleasure by filing an impression of the same in the office of the Secretary of State."

Section 9, chapter 52, Laws of 1901, provides:

"The Secretary of State shall exact a fee of $2.50 for filing and recording each certificate of impression of the corporate seal of any corporation."

There seems to be no fixed method of filing impression of corporate seal, but any substantial method of filing it, so that the impression of the particular corporate seal can be identified with the corporation to which it relates, would, in my judgment, be such a substantial compliance with the law as would entitle the corporation to receive a certificate to the effect that the filing had been made; and, if this is true, then, as a prerequisite to making such filing, you would be justified in exacting the fee of $2.50 for filing the same.

The certificate mentioned in section 10 of the same chapter shall not be issued until full payment has been made by the corporation of all fees and taxes prescribed by law to be paid to the Secretary of State.

If the filing of the corporate seal has been made in some substantial way so as to entitle the corporation to a certificate of such filing, then the fee is due, and until it is paid the certificate mentioned in section 10 should not issue.

If the corporation desires a certificate, certifying to the filing of the corporate seal, you will charge them the usual fee for such certificate.

Yours respectfully,

N. C. MILLER,
Attorney General.

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## ANNUAL REPORT OF CORPORATIONS.

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**The revenue act of 1902 makes it obligatory upon all corporations to file an annual report, in accordance therewith, with the Auditor of State.**

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Denver, Colo., June 18, 1903.

INTERNATIONAL HARVESTER CO. OF AMERICA,
215 Dearborn Street,
Chicago, Illinois.

Gentlemen—In reply to your letter of May 29, I wish to say:

First. Your letter remained unanswered because of my absence during the last of May and the first of June, and pressure

of business since my return has prevented its consideration until this week.

Second. Reports required to be filed by corporations are covered by section 63 of the Revenue Act of 1902, and by the Corporation Act of 1901. Reports under the latter are required to be filed with the Secretary of State, and for failure to file them, the officers and directors, jointly and severally, become liable. The reports required to be filed by section 63 of the Revenue Act are designed to arrive at a fair valuation of the property and its distribution to the several counties.

Third. The language of the section is very broad and comprehensive, and states what corporations are excluded. It says "every corporation doing business and owning property in two or more counties of the State." We must therefore look for the exceptions. The section provides that every corporation, "except as otherwise provided in this act," shall make out and deliver annually to the Auditor of State its report. Now these words "otherwise provided in this act" refer to eleemosynary and beneficiary coroprations, and such corporations as are taxed by the State Board of Equalization. The last include telegraph companies, telephone lines, railways and such like corporations. Other than these, there are none, and, therefore, the State requires a report to be filed whether the corporation be domestic or foreign. I can see no reason in excepting a corporation merely because it is foreign.

Fourth. The purpose of this act is to gather information at some central point concerning the entire property of a corporation so that there may be no evasions.

To illustrate the use of this report, let us take the instance of the Singer Sewing Machine Company, which has filed its articles of incorporation in Colorado and does business in Colorado, and keeps a local office in the city of Denver. It carries a stock of machines in Denver, and also has them scattered throughout the State in all the important towns and cities. The intention of the Legislature was to require this company to value and locate all of its property. Every county assessor who feels that this company is evading taxation can consult its general report. The necessity of the report arises from this condition of affairs: When a local assessor approaches an agent of such a company he is generally remonstrated with and told that the machines situated in his county are not subject to taxation as they are there only temporarily on sale. This process is carried on throughout the State, and when the city of Denver is reached the assessor is told that the property of the company is not in Denver but it is scattered throughout the State, and the local assessors outside of Denver are told that they must not assess the property because it is only transient property and is assessed in Denver.

I think your notion of the matter is a mistaken one, and the framers of the law have a clearer view of what they meant by it.

I have given this matter considerable study and investigation, and at first was inclined to your view, but being somewhat apprehensive that I might be wrong, delayed writing an opinion until I might make a full investigation, the result of which is set out herein.

Yours truly,

N. C. MILLER,
Attorney General.

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## ANNUAL CORPORATION REPORTS.

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**The annual report of a corporation should be received and filed by the Secretary of State, even though corporation had not complied with all other requirements.**

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Denver, Colo., February 16, 1903.

HON. JAMES COWIE,
Secretary of State,
Capitol Building.

Dear Sir—You report to this office that The El Paso Reduction Company, a corporation, has offered its annual report for 1902, and that the same shows an increase of capital stock of One Hundred Thousand Dollars ($100,000), which amendment does not appear on the records of your office, and you have therefore refused to file the report until you are advised by the legal department as to what is the proper course to pursue.

Section 1 of the act in relation to corporations, approved April 6, 1901, provides for a fee of twenty cents on each thousand dollars of increase of capital stock of domestic corporations, and thirty cents on each thousand dollars of increase of the capital stock of foreign corporations.

Section 2 provides:

"No such corporation, joint stock company, or association shall have or exercise any of its corporate powers, or be permitted to acquire or hold any real or personal property, rights or franchises, or to do any business or to prosecute or defend in any suit in the State after an increase in its capital stock, until such fee shall be paid."

Section 3 provides:

"Any coropration * * * that has increased its capital stock without paying the fees prescribed by the laws of this

State at the time of such increase, or that shall hereafter increase its capital stock, shall be liable to pay the fees prescribed by this section, and in default, * * * it shall be the duty of the Secretary of State to cause an action of quo warranto to be brought against the corporation."

Section 3 also provides that in case of failure to pay such fees that the aforesaid directors or stockholders shall be personally liable for the debts.

This latter provision does not seem to be found in the statutes covering corporations organized under the laws of any state beyond the limits of Colorado.

Section 11 provides that every corportion shall file an annual report making certain expositions of its business and the condition of its corporate organization. The purpose of this report is to gain information concerning the affairs of the company and to be of service to the State and to those who are concerned in the dealings of that corporation, and, in my judgment, it is on no account to be suppressed because of failure to pay fees. The object, at all times, is to gain the required information through this report, of the condition of the corporation, no matter what other laws it may violate.

I am, therefore, of the opinion that the annual report should be filed, and that it is your duty to make a demand upon this corporation for the fees due the State for the increase of its capital stock of one hundred thousand dollars, if such appears to be the case. Upon the failure to pay, you will be justified in bringing quo warranto proceedings. I presume, in the first instance, a rule should be served on the company to show cause why quo warranto proceedings should not be commenced.

If you will investigate the case and report to this office, we will take any necessary steps.

Yours truly,

N. C. MILLER,
Attorney General.

## ARTICLES OF INCORPORATION.

**Blanket Form of Articles of Incorporation—Articles of incorporation should set forth the object for which the company is sought to be incorporated, and the name adopted should reasonably designate such objects.**

Denver, Colorado, February 14, 1903.

HON. JAMES COWIE,
Secretary of State,
Denver, Colorado.

My Dear Sir—You have submitted to me the question as to the duty of the Secretary of State, in receiving artices of incorporation for filing and for fees when the proposed articles of incorporation, in a blanket form, cover about all the powers possible for corporations in the aggregate to possess.

Section 472, M. A. S., provides:

"Corporations may be formed under the provisions of this act for any lawful purpose."

Section 473 provides:

"Any three or more persons may form a company for the purpose of carrying on any lawful business;"

and requires that they shall set forth the objects for which the company shall be created.

It has been said that there is a difference between the powers of a corporation and the powers of a natural person. The latter can do anything not forbidden by law. The former can do only what is expressly or impliedly authorized in its charter.

Shields vs. Ohio, 95 U. S., 319.
Abby vs. Billups, 72 Am. Dec., 143.

Corporations are either created by special act of the Legislature, or formed under general laws. When a corporation is created by special act, that act is its charter, and determines its powers.

When a corporation is formed under the general laws, as is the case in Colorado, its charter consists of the statute or statutes under which it is formed, and which defines its powers, together with the instruments required by such statute or statutes to be executed and filed by the incorporators. These are usually called articles of incorporation.

A reading of the paper which you have presented to me for an opinion, discloses that the incorporators have stated as

powers almost everything that it would be possible to conceive of a natural person doing. The framers of it appear to attempt to comprehend within its articles every power. A few simple powers have been omitted, but the great powers, including the construction of irrigating ditches, telegraph and telephone lines and railroads, sewer systems and water works, and the promotion of manufactures and schools, churches, guaranteeing bonds, and buying and selling negotiable instruments, and, in short, all classes of corporations are included in this one instrument.

The law of Colorado authorizes the formation of a corporation for any lawful business, and the name of the corporation must furnish a fair and intelligent index to the business carried on.

I consider that it would be impossible to adopt any name which would fairly indicate everything which the organizers of this corporation have in view, and, therefore, you would be justified in requiring them to file only for those powers which are fairly comprehended within the meaning of the name adopted.

Section 472, M. A. S., says that the name shall indicate the business to be carried on by the corporation. In this case the proposed name was "The Land and Improvement Company." Now, the latter word must be limited in its application to the word "Land." The improvements must be such as are naturally applicable to land; otherwise the term could be extended to cover almost any power which can be exercised for the improvement of any object, and that would render the meaning of the last mentioned section unintelligible.

But a graver objection to the inclusion of a blanket statement of powers in one set of articles of incorporation grows out of the fact that our Legislature has specified a particular mode of incorporating railroads, ditch companies, telegraph lines, telephone lines, banks, guaranty companies, savings banks, mining companies, gas companies, and it would be impossible to gather all these into one set of articles of incorporation and comply with the requirements of those statutes.

For instance, in the proposed articles of incorporation, while the organizers propose to construct ditches, they do not define the location of headgate, or the course of the ditch. The same difficulty exists as to telegraph lines, telephone lines and railroads which they propose. So far as they intimate a power to do banking business, they say nothing about the capital stock devoted exclusively to that business, nor do they attempt to set up any of the other specifications which are required by the act in relation to banking.

The State of Colorado, through your office, is interested in the collection of the proper amount of fees required for incorporating companies, and where there is an attempt to gather

three or four different kinds of business into one set of articles, my judgment is that you should reject them for two reasons:

First. Because the State will not receive the proper amount of fees; and, second, because of the impossibility of adopting a name that would indicate what business is to be carried on by the proposed corporation.

In acting upon this suggestion, you should be liberal and resolve all doubts in favor of the incorporators, and the test you will apply will be to observe the name selected for the corporation, and then see whether the powers that are set forth are incidental to the carrying on of the principal business mentioned in the corporation name. If there has been a clear attempt to include banking, railroad and ditch companies, mercantile business, etc., in one set of articles of incorporation, you would be justified in rejecting them.

People vs. Nelson, 46 N. Y., 477.

It is the general rule that corporations must be organized in substantial compliance with the statute granting the particular power, in order to do business; as, for instance, a railroad must be organized in strict accordance with the specific statute, in order to carry on a railroad business, or to exercise the right of eminent domain; and the same rule applies to banking companies, ditch companies and other companies specially provided for by statute. Unless the papers filed comply with these particular statutes, the power which is defined in them is not obtained by the organization. The authorities hold that there must be at least a substantial compliance with the statute.

Yours respectfully,

N. C. MILLER,
Attorney General.

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## DISTRICT ATTORNEY—COMPENSATION OF.

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**Under our statute, district attorney is entitled to $10.00 per day for each day's attendance at habeas corpus proceedings, no matter how many hearings are heard.**

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Denver, Colo., January 16, 1904.

S. G. M'MULLIN, ESQ.,
District Attorney Seventh Judicial District,
Grand Junction, Colorado.

Dear Sir—Replying to your request for my opinion as to the construction of that portion of section 1873 of the third volume

of Mills' Annotated Statutes, providing for the fees of district attorneys in habeas corpus hearings, and informing me that you construe the statute as authorizing you to charge a fee of $10 for each petitioner in habeas corpus proceedings, regardless of whether the several petitioners filed separate petitions, or joined in one petition, or have a joint hearing.

The particular clause of the section of the statute above referred to is as follows:

"For each day's attendance at coroners' inquests and hearings on habeas corpus, $10."

The case of Board of Co. Comrs. v. Graham, 4 Colo., 204, does not, in my opinion, justify your interpretation of this section, because the wording of the statute in that case was essentially different from the wording of the statute involved in the question raised by your letter. There the fee was allowed for every conviction, so that, inasmuch as in the case of joint indictment and trial where both were convicted there was a conviction of two persons, the Supreme Court held that for each conviction the district attorney was entitled to his fee. But in habeas corpus proceedings the district attorney is allowed his fee, not for each hearing or each case, or for each petitioner, but "for each day's attendance * * * at hearings on habeas corpus"; so that the fee is a per diem fee for attendance upon the court in habeas corpus proceedings. It matters not how many petitioners there may be in the habeas corpus proceedings, or how many different hearings on the one day, the one fee of $10 is all that the district attorney is justified in claiming for one day's attendance in habeas corpus hearings.

The case nearest in point on the wording of the statute and the facts, which I have been able to find in the limited time available for the examination, is one that arose under the revised statutes of the United States, which provide that a United States Attorney shall be allowed "for examination * * * before a judge or commissioner, of persons charged with crime, five dollars a day for the time necessarily employed." U. S. Rev. Stat., Sec. 824.

The United States Circuit Court of Appeals held that, in a case arising under this section, "If, on the same day, he (the district attorney) attends examinations before different commissioners and at different places, he may, according to the decisions cited, charge a per diem, and of course mileage, for each attendance; but the proposition that there may be two or more such charges for attendance before one commissioner and in one day seems to us without support either in the language of the statute or in the decisions referred to." And, again, in distinguishing the cases cited by the district attorney in support of the contention, the court says: "But in neither opinion is it said or implied that for attendance before a single commissioner in different cases

on the same day a district attorney may charge a per diem for each case." U. S. vs. Colma, 76 Fed., 214, 216.

It has also been held that two fees can not be charged for two days' work in one. Stanton vs. U. S., 37 Fed., 252.

I am therefore of the opinion that you are not entitled, under the statute, to charge more than $10 for each day's attendance at habeas corpus proceedings, no matter what the number of petitions or the number of petitioners is at the hearings on the particular day. I am,

Yours respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

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## GENERAL ELECTION, DEFINITION.

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**The regular election held for supreme judge is a general election, at which vacancies for county assessor and district judge should be filled.**

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Denver, Colo., July 13, 1903.

MR. F. P. MANNIX,
Clerk of Teller County,
Cripple Creek, Colorado.

Dear Sir—Replying to yours of the 11th inst., I would say that since writing you on the 9th inst. it became necessary for me to give an opinion to the Secretary of State on the matter of election of additional judges in the Fourth and Eighth Judicial Districts of this State, which opinion necessarily passes upon the same questions involved in your letters of the 9th and 11th inst.

I am, therefore, of the opinion that you should accept nominations of candidates for the offices of county assessor and district judge to be voted for at the next general election to be held in November next.

As to the county assessor, I would say that section 9, article XIV of the State Constitution, being 1 M. A. S., Sec. 484, provides that in the case of the appointment of a person to fill a vacancy in a county office, that the person appointed shall hold office until the next general election, or until the vacancy be filled according to law. Section 1589 of 1 M. A. S. is but a reiteration of this constitutional provision, so that both under the statutory

and constitutional provisions the question turns upon the meaning of the words "next general election."

While this expression has been construed somewhat differently by different courts, I am of the opinion that the better rule is that a general election within the meaning of these statutes is an election general over or throughout the entire State. This, though not definitely decided therein, appears to be the construction of our own Supreme Court in People vs. Le Fevre, 21 Colo., 234. For additional authorities see

People vs. King, 17 Mo., 511.
State vs. Conrades, 45 Mo., 45.
Mackin vs. State, 62 Maryland, 244.

The term of office, therefore, of the appointee of the office of county assessor to fill the vacancy would be until the general election to be held in November next.

As to the term of office of the county assessor to be elected next November, I would say that I am of the opinion that under section 8, chapter 50, of the Session Laws of 1901, being the amendment to section 8, Art. XIV of the Constitution, which was adopted at the last general election held in this State, and which is now in force as a part of the Constitution, that his term of office would expire on the second Tuesday of January, A. D. 1905, because the term of office of all county officers, together with those of other county officers in said section enumerated, is extended until that date. This amendment does not affect, except to that extent, section 9 of the same article, being section 484, M. A. S.

As to the election of the additional judge in your district, being the Fourth Judicial District, the terms of the act of the last session of the Legislature under which the present incumbent was appointed, provided that he should hold office "until the next general election, and until his successor is elected and qualified." Session Laws 1903, page 192. So that the question of the length of term of the present incumbent is, like that of your county assessor, dependent upon the meaning of the words "next general election," and the same reasoning is applicable in this case as in that of the assessor.

In addition to the cases above cited, however, I would call attention to the language of the Constitution and statutes applicable to district judges. By section 15 of article VI of our Constitution it is provided that district judges "shall be elected at the time of holding the general elections." By section 29 of article VI it is provided that the Governor may fill vacancies and that such appointees "shall hold office until the next general election and until their successors elected thereat shall be duly qualified." The statutes under consideration are, therefore, but a reiteration of the constitutional provisions.

The time of holding general elections and the officers to be voted for thereat have been provided by statute. By section 1578, M. A. S., it is provided that at the general election in 1879, and every third year thereafter, a judge of the Supreme Court shall be elected, and at the general election in 1882, and every sixth year thereafter, judges of the District Court in the several judicial districts shall be elected.

The election, therefore, of a judge of the Supreme Court is a general election, and as next November the judge of the Supreme Court is to be elected, this is the next general election, until which, the additional judge of your district, appointed by the Governor, holds office, and at which his successor shall be elected.

As to the term of office I would say that, as by section 15, article VI of our Constitution, the terms of office of all judges of the District Court must expire on the same day, the term of office of that district judge to be elected next November, must expire on the same day as the other district judges in this State; that is to say, he is elected for the unexpired portion of the term of six years of the district judges of this State.

In re Election of District Judges, 11 Colo., 378.
People vs. Le Fevre, 21 Colo., 218.

I am, Yours respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

NOTE—This opinion was subsequently sustained by the decision of the Supreme Court on October 14, 1903, in the case of F. P. Mannix vs. Emil Selbach, 74 Pac., 460.

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## QUALIFICATION TO VOTE AT.

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A woman desiring to vote at school elections must have the same qualifications as male electors.

It is not contrary to the Constitution to prevent women voting at such elections if not duly qualified as above.

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Denver, Colo., April 18, 1904.

MRS. M. N. WARNER,
714 East First Street,
Pueblo, Colo.

Dear Madam—In reply to your favor of the 13th inst., asking if residents of this State, who have only taken out their

first papers, can vote at school elections for school directors, I beg to say that, while women were allowed to vote at school elections previous to their enfranchisement in 1893, by section 1 of that act, Session Laws 1893, page 256, they are now required to possess all the qualifications required by law to entitle male persons to vote.

Under the act known as the Barela Amendment, Session Laws 1901, page 107, section 1 of article VII of our State Constitution was amended to read as follows:

"Section 1. Every person over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections. He or she shall be a citizen of the United States, and shall have resided in the State twelve months immediately preceding the election at which he offers to vote, and in the county, city, town, ward or precinct, such time as may be prescribed by law."

In accordance with this amendment an act was passed by the Thirteenth General Assembly, Session Laws 1903, page 214, as follows:

"Section 1. That section 1, page 34, of the General Statutes of the State of Colorado, entitled 'Elections,' be, and the same is hereby, amended to read as follows:

"Section 1. Every person over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections: First, he shall be a citizen of the United States; second, he shall have resided in the State one year immediately preceding the election at which he offers to vote; in the county ninety days, in the city or town, thirty days, and in the ward or precinct, ten days."

This is the present law upon the subject, and I know of no reason why it is contrary to the Constitution of the United States in regard to women voting at school elections.

Yours respectfully,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

## EX-CONVICTS MAY VOTE.

**Ex-convicts, who were qualified electors prior to imprisonment, are entitled to vote after their release, either by pardon or by reason of having served out the full term, provided they are registered.**

Denver, Colo., October 31, 1904.

JOHN CLEGHORN, ESQ.,
Warden State Penitentiary,
Canon City, Colorado.

Dear Sir—In reply to your inquiry as to whether a person who is released from the Penitentiary, either by pardon or by having served out his full term of imprisonment, may vote in this State after such release, I would advise you as follows:

By section 1572 of the first volume of Mills' Annotated Statutes, which is the portion of the statute relating to qualifications of electors, you will find that it is provided that, while no person shall be entitled to vote while he is confined in any public prison, it is also expressly provided that

"Every such person who was a qualified elector prior to such imprisonment, and who is released therefrom by pardon or by having served out his full term of imprisonment, shall be vested with all the rights of citizenship except as provided in the Constitution."

By sections 4 and 10 of article VII of our State Constitution, it is also expressly provided that no person shall be entitled to vote while confined in a public prison, and section 10 also contains the following provision:

"But every such person who was a qualified elector prior to such imprisonment, and who is released therefrom by virtue of a pardon or by virtue of having served out his full term of imprisonment, shall, without further action, be invested with all the rights of citizenship, except as otherwise provided in this Constitution."

Colo. Const., sections 4 and 10, being 1 M. A. S., sections 406 and 412.

It will be seen that the statute (1 M. A. S., 1572) is but a reiteration of the constitutional provision.

I am aware that section 1451 of the first volume of Mills' Annotated Statutes provides that any one convicted of the crimes therein specified will be incapable of voting at any election; but, in this respect, this statute is in violation of the constitutional provisions above quoted, and so of no effect.

I am, therefore, of the opinion that any person who has been confined in the Penitentiary, or in any other public prison, but who has been released therefrom, either by pardon or by having served out his full term of imprisonment, and who was a qualified elector prior to such imprisonment, is entitled to vote, provided he is registered as required by law. I am,

Yours respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

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## STRIKING NAMES FROM PERMANENT REGISTRATION.

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**The checking of registration lists, required of county clerks, refers to county and State elections only, and not to city elections.**

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Denver, Colo., October 29, 1903.

HON. C. C. EDDY,
Durango, Colorado.

Dear Sir—In answer to your interrogatory as to whether the Board of County Commissioners has a right to strike from the registration the names of persons who failed to vote at the spring election, held for city purposes, I beg leave to reply as follows:

In city, county, district, State and national elections, citizens of cities of the first and second class are required to be registered in your office, whether the precinct is included wholly or partially within the limits of such city.

Section 1, page 68, Laws of 1894.

"Within thirty days next after each election in the precincts included within the limits of any such city, the county clerk and recorder of the county shall proceed to check the poll list of persons who voted in each such election precinct with the registration list for such precinct, and shall in some proper manner mark and designate the names of the persons not shown by said poll list to have voted at such preceding election in such precinct."

Section 14, page 81, Laws 1894.

If the right to check exists, then, where the district is partially included in the city, all the names of the persons not voting in such precinct would include those living outside the city.

The precincts in city elections, as in Durango, do not necessarily correspond to the county precincts. In city elections they conform to wards. In county elections the wards have no connection with city precincts. The precincts are, therefore, utterly different. The checking which the county clerk is required to do relates evidently to the precincts for county elections.

The poll books in city elections are filed with the city clerk. In Longmont, for instance, this office is remote from the county seat. How can the county clerk obtain the poll list and check it with the registration list? There is no power that can take them out of the custody of the city clerk, nor can he find any authority to compel the city clerk to bring them to his office and remain there in custody of them while he does this checking. Furthermore, the county commissioners have nothing to do with such registration. The idea and purpose of the law was to purge the registration, in the county clerk's name, of superfluous names. It is sufficient for this purpose that the clerk have access to the poll books for county elections.

There is no reservation in section 14 as to voters in the precinct who live outside of the city, and who fail to vote at city elections. These should be stricken for failing to vote at city elections if the construction is true which your county commissioners have applied to it. This would be absurd, hence, must be rejected as the proper construction.

But it is said that there are distinct precincts for city elections, and, also, distinct precincts for county elections, and that for a city election a comparison is made with the poll book of the city precinct, and the names of the persons residing within such precinct are stricken off for failure to vote. I wish to direct your attention to the act, and have you note that there is no authority for any such action. The poll lists must come from the same identical precinct as that to which the registration book in your office belongs. This is the language of section 14. The poll list used for checking must come from the same precinct which your registration book covers, and you can not resort to a poll book belonging to a different precinct to check the book in your office. The language of the act is:

"Check the poll list of persons who voted in each election precinct with the registration list for such precinct."

Now, you have no registration list in your office corresponding with the precinct used in city elections.

I have carefully considered this matter, and I am confirmed in the correctness of this opinion. If I have not used distinct

language it is because I have not sufficient time to revise the opinion.

Respectfully,

N. C. MILLER,
Attorney General.

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## EMPLOYMENT BY THE YEAR.

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Where a professor is employed by the year, at a yearly salary, payable in monthly installments, he should be paid for the entire twelve months, even if he does other work during vacation, provided he holds himself subject to the orders of the board. Where a professor dies, his heirs are not entitled to receive his salary for the balance of the year remaining after his death.

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Denver, Colo., May 25, 1903.

MESSRS. JOSEPH F. JAFFA AND JAMES T. SMITH,
Committee Representing the Board of Trustees
of the Colorado School of Mines.

Gentlemen—Replying to your letter of the 20th inst., enclosing a letter from the faculty of the School of Mines, requesting my opinion on matters referred to therein, I would say that where a professor is employed by the year at a yearly salary, payable in installments, I think he should be paid for the whole twelve months, even were he to take other work during the summer vacation, provided he holds himself in readiness to comply with the orders of the board.

In the case of Professor Hartman, deceased, it is my opinion that his heirs have no right to receive his salary for the balance of the year after his death, and that his salary ceases with his death. The reason is apparent in that it is impossible for him to carry out his part of the contract, which, being a contract for personal services, ceases with his death.

I think this answers fully all your inquiries. If not, I shall be pleased to make further reply upon your request.

The letter of the faculty with attached memorandum is herewith returned.

Yours truly,

N. C. MILLER,
Attorney General.

By H. J. HERSEY.

## STATE ENGINEER.

**Division engineer has authority to act as water commissioner. State Engineer has general control of public waters of the State, and general charge over division engineers and water commissioners.**

Denver, Colo., October 17, 1903.

L. G. CARPENTER, ESQ.,
State Engineer,
State Capitol.

Dear Sir—I have your letter inquiring:

First. Whether, under section 2454, M. A. S., the superintendent of irrigation, by himself, or through a deputy, has the authority to act as a water commissioner in any district where there is a water commissioner actually in service in that district.

Second. Whether, under the statutes, the State Engineer would have authority in person, or by deputy, to adjust, open or close such gates. Would such authority be implied by section 2386, M. A. S., or other provisions of the statutes?

In reply I would say that I assume that you use the expression "superintendent of irrigation" for that of "irrigation division engineer" as the former office no longer exists, having been abolished by the act approved April 4, 1903, and found in Session Laws 1903, at pages 281-288, by section 9 of which act, the irrigation division engineer is governed by all acts heretofore enacted, relative to superintendents of irrigation.

In reply to your first question above quoted, I would say that section 2454 of M. A. S., provides that superintendent of irrigation (now irrigation division engineer), "shall have power to perform the regular duties of water commissioner in all districts within his division."

By section 2386, M. A. S., it is provided "that the orders of the superintendents of irrigation in their respective divisions, and the orders of the State Engineer, shall be held, at all times, superior to the orders of water commissioners, and shall relieve any person acting in accordance with such superior order, from the penalties herein provided; and provided also, that, in like manner, the orders issued by the State Engineer shall be held superior to any order issued by any superintendent of irrigation," so that my answer to your first question is, that the superintendent of irrigation, or irrigation division engineer as he is now called, has authority to act as water commissioner in any district where there is a water commissioner actually in service in that district; but, as a matter of practical policy, the irrigation divi-

sion engineer would, naturally, act through the water commissioner.

In reply to your second question I would say that, inasmuch as section 2386, M. A. S., above quoted, especially provides that the orders issued by the State Engineer shall be held superior to any order issued by a superintendent of irrigation, as well as other provisions of the statutes relating to the powers and duties of the State Engineer, I am of the opinion that the State Engineer has the authority to adjust, open or close such gates whenever, in his opinion, it is necessary for him so to act, and that an act he can do himself, he can order done by his deputy, as he is given power to appoint a deputy either generally or to do a particular service. See section 2454, M. A. S.

Moreover, the State Engineer is given general supervision and control over the public waters of the State. See section 2459, M. A. S.; and is also given general charge over the work of division water superintendents and district water commissioners. See section 2461, M. A. S.; also section 9, Session Laws 1903, page 284; and section 5, Session Laws 1901, page 195.

Yours truly,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

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## STATE ENGINEER—IRRIGATION.

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Opinion of October 17, 1903, as to authority of State Engineer to open or close headgates, etc., affirmed. This office can not pass upon effect of injunctions against State Engineer in advance of a concrete case.

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Denver, Colo., March 11, 1904.

L. G. CARPENTER, ESQ.,
State Engineer,
State Capitol.

Dear Sir—I have your letter requesting my advice as to the authority of the State Engineer, in cases where the superintendent of irrigation or water commissioners are unable to act for any reason, and as to whether in the case an injunction has been served upon the superintendent of irrigation or water commis-

sioner, or both, and not upon the State Engineer, the State Engineer or his deputy could take charge of and close the head gates, etc.

In regard to the general authority of the State Engineer to adjust, open or close head gates, I would refer you to my previous opinion to you upon this point, dated October 17, 1903, which, I think, sufficiently covers the subject.

As to what would be your authority or duty in case of an injunction to restrain the closing or interference with head gates, you will appreciate, upon further reflection, that I could not advise you in advance of knowing just what the particular injunction covered, for no general rule would be safe for you to act upon. I am,

Yours respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

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## CHARGES AGAINST WATER COMMISSIONER.

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In preferring charges against a water commissioner, complainant should be required to furnish a bond in a reasonable sum, fixed by division engineer, conditioned upon reasonable expenses being paid to the commissioner in case charges are false. Next commissioner should be furnished copy of charges and notified of day of hearing. At the trial he can be represented by counsel and have testimony reduced to writing. Depositions may be taken in any part of the State, and the decision must be rendered within five days after the trial. Within ten days thereafter all papers should be filed with State Engineer, that he may review the same, if commissioner is suspended. If suspension made permanent, Governor fills by appointment.

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Denver, Colo., August 31, 1903.

L. G. CARPENTER, ESQ.,
State Engineer,
State Capitol.

Dear Sir—I have your letter informing me that charges have been made against a water commissioner to the division engineer having jurisdiction over Irrigation Division No. 1, under section 10 of an act approved April 4, 1903, found in Session Laws of 1903, pages 281-288, and requesting that, as this is the first com-

plaint, I give you my advice as to the proper mode of procedure in such cases.

It will be seen by said section 10 that the first thing required of the complainant is to make and file with the division engineer of the proper irrigation division such charges as he desires to make against the water commissioner, which charges must be specifically set forth in writing.

The complainant is required to furnish a good and responsible bond in such reasonable sum as may be fixed by the division engineer, conditioned on the payment of the reasonably necessary expenses incurred by the water commissioner in case the charges preferred against him are not sustained by the division engineer. It is not stated to whom the bond shall be given, but, as it is for the benefit of the water commissioner against whom the charges are filed, the bond should be made to the water commissioner. As it is impossible in advance to estimate the possible expenses of the hearing and trial, the division engineer should fix the bond in a sum sufficiently large to cover the reasonably necessary expenses incurred by the water commissioner, in case the charges are not sustained; and ordinarily a bond for from $500 to $1,000 would be amply sufficient. This bond should be required at the time the charges are filed, in order that the hearing may not be undertaken if the complainant is unable to comply with this statutory requirement. I advise that the division engineer endorse upon the bond when approved the fact and date of its approval by him; also the date on which it was filed.

The next step is the notification of the accused water commissioner that charges have been made against him, which notification should be accompanied by a written copy of the charges, and should notify the accused of the time of the trial, which should be set for not less than five days after the service of such notice. No manner of service is provided by the statute, and in order to definitely fix the date of service the only safe course to pursue is to have some person personally serve the notice, with a copy of the charges, and to make affidavit as to the time and manner of such service after the manner of serving a summons in an ordinary civil action. The copy of the charges should, of course, be furnished by the complainant at the time of filing the original with the division engineer.

At the time of trial, being not less than five days after the service of notice and copy of charges upon the accused, the division engineer hears and tries the case after the manner, as near as may be, of ordinary trials in courts.

The statute expressly provides that the water commissioner shall be permitted to appear in person and by counsel, and introduce evidence.

At the trial, the statute expressly requires that all oral testimony shall be reduced to writing. It is also provided that either party may take depositions anywhere in the State, and

may have them read at said trial by giving the opposite party twenty-four hours' "notice of the time, place and names of the parties whose depositions are thus to be taken." Notice of the taking of depositions should, of course, be filed with the division engineer, so that before the depositions are read in evidence before him he may be advised whether they were taken upon proper notice. The reducing to writing of the oral testimony, of course, necessitates the employment of a stenographer competent for that purpose.

Within five days after the date set for trial, the case must be tried and decided by the irrigation division engineer, so that in no event should the trial and decision consume more than five days.

If, after hearing the evidence and argument of counsel, the division engineer finds the water commissioner guilty of any of the offenses charged, then, and in that event only, is the irrigation division engineer empowered to suspend him.

Within ten days after the decision of the division engineer suspending the water commissioner, the division engineer is required to file all pleadings, papers and testimony with the State Engineer, that he may review the case.

Upon the filing of the pleadings, etc., with the State Engineer, the State Engineer is required to appoint a competent deputy to at once assume control of the district of the water commissioner so suspended, which deputy retains control until the disability of the commissioner is removed, or a new commissioner is appointed and qualified, and he is paid from the State Engineer's Assistants' Fund.

The State Engineer is required to review the action of the division engineer as expeditiously as possible, and within thirty days from the time of receiving such papers, must submit his findings to the Governor for his action.

If the State Engineer recommends to the Governor in his findings that the suspension should be made permanent, the Governor is required to forthwith appoint, upon the recommendation of the proper board of county commissioners, as provided by law, some suitable and competent person to fill the vacancy.

No manner of procedure for review by the State Engineer is laid down by the statute, so that the State Engineer is at liberty to consider the case with or without argument of counsel upon the pleadings, papers and testimony filed with him by the division engineer, but the language of the statute, "for review," does not contemplate the taking of any additional testimony by the State Engineer, but simply a review of the record as submitted to him by the division engineer. This power of review, of course, permits the State Engineer either to sustain, modify or reverse the decision of division engineer, and, while

the statute seems to require that the State Engineer shall submit his findings to the Governor for his action, yet it makes no provision for any action by the Governor, other than that in case of the recommendation by the State Engineer in his findings that the suspension of the water commissioner be made permanent, the Governor shall appoint some competent person to fill the vacancy. So that in the absence of any decision of a court on the matter, I am of the opinion that only in the case of a suspension recommended to be made permanent has the Governor anything to do in such cases.

It will be seen that there is no provision for the payment of the costs of the trial, other than the provision requiring complainant to put up a bond to cover the reasonably necessary expenses in case the charges are not sustained; but I would recommend that the practice of the courts be followed in order that the funds of your department may not be used therefor, requiring each party to advance his proportion of the expenses incurred in such hearing and trial, as I think this would be a reasonable rule and regulation.

I would further advise that the division engineer endorse upon each and every pleading and paper filed with him the date of its filing, and enter the same upon a docket book kept as dockets of courts are kept; and that you also keep a docket book for such cases, and endorse upon the pleadings, papers and testimony filed with you, the date of their filing.

The oral testimony, when reduced to writing, should be signed by the witnesses respectively at the end thereof.

As the statute does not give the power to the division engineer to administer oaths, it would be advisable that the stenographer should also be a notary public to swear the witnesses before the testimony is taken.

I enclose herewith a form of notification, affidavit of service, and, also, form of bond to be required by the division engineer.

Respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

## FISCAL YEAR OF COUNTIES.

The fiscal year for counties shall commence on the first day of January of each year.

Denver, Colo., January 22, 1904.

MR. C. I. CRISSY,
Special Agent, Department of Commerce and Labor,
Trinidad, Colo.

Dear Sir—In reply to your letter of the 18th inst., in regard to the fiscal year of counties of this State, I beg to refer you to section 1, page 111, of the Session Laws of Colorado for the year 1891, or 3 M. A. S., 799a, which provides that the fiscal year of each county in the State shall commence on the first day of January in each year.

This act makes the fiscal year uniform for all counties, and takes the question of deciding the time when the fiscal year shall commence entirely out of the hands of the board of county commissioners.

Yours respectfully,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

## DIRECTORY PROVISIONS.

Forms attached to an act are directory only, and should be construed to carry out the intention of the legislature, as expressed in the mandatory part of the bill.

A permit becomes void upon proof of the violation of the law. Each person collecting must have a permit. It can not be given to any agent or assistant.

Denver, Colo., May 15, 1903.

HON. J. M. WOODARD,
Game and Fish Commissioner,
State Capitol.

Sir—In reply to your favor of the 6th inst., as to the interpretation of certain portions of the act "To protect birds and

their nests and eggs," passed by the Fourteenth General Assembly, I beg to submit the following opinion:

You first ask if it is obligatory upon you, in issuing permits, to follow the form given in the act.

It is the general rule of law in regard to forms which are made a part of, or attached to, an act, that the form is directory only, and should be construed to carry out the intention of the Legislature, as expressed in the mandatory part of the bill.

Endlich, on the Interpretation of Statutes, section 71, and notes.

So that your duty in this case is to construe and adapt this form, to carry out the intention of the Legislature, as shown by the mandatory terms of the act.

As to the length of time for which a permit should be granted, the Legislature undoubtedly intended to limit the maximum length of time to one year, and you have the right to determine when the fiscal year for permits shall begin and end, so as to facilitate the keeping of records thereof.

The mandatory portion of the act says that a permit shall become void on proof that the holder has killed any bird, or taken the nest or eggs of any bird for other than scientific purposes, and that his bond shall be forfeited to the State, and, while it would be better for the proper authority to revoke the license in a formal way, so that the records of his office will properly show the same, still there is no question but what the proof of the violation of that law itself makes the permit void.

As to your authority to issue a permit to read so as to permit any agent or assistant to collect for some other person, the law does not contemplate any such action upon your part, but, on the contrary, each person, whether the agent or otherwise, should have a permit to make the collection.

I herewith enclose, as per your request, a suitable form of bond, endorsement and permit.

Respectfully,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

## COMPENSATION OF JUSTICES OF THE PEACE UNDER GAME LAW.

**It is the duty of justices of the peace who try violators of the game and fish law to immediately pay one-third of the fine into the treasury of the county where the crime was committed, and one-third to the commissioner, and one-third to the person instituting the prosecution, and to collect his own costs from the defendant. He is allowed no compensation from the fine for making his report.**

Denver, Colo., March 10, 1904.

HON. JAMES WOODARD,
Fish and Game Commissioner,
State Capitol.

Dear Sir—In reply to your favor of this date, concerning the right of a justice of the peace to deduct from the State's share of fines collected for violations of the game and fish laws of Colorado, a fee for turning the said money over to the Commissioner, or for making the written report in connection therewith, as required by sections 10 and 11 of said laws, I beg to say that section 10 plainly reads that

"All moneys collected for fines under this act shall be immediately paid over by the justice or clerk collecting the same, as follows: One-third into the treasury of the county where the offense was committed; one-third to the Commissioner, and one-third to the person instituting the prosecution."

And section 11 makes it his duty to report, in writing, the result of trials for such violations, and the amount of fine collected, if any, and the disposition thereof, to the Commissioner, at Denver.

It will thus be clearly seen that this law allows the justice no further compensation, either for turning the money over to the Commissioner, or for making the written report other than the legitimate costs of the case to be taxed against the defendant when found guilty.

The justice fee act makes provision for the compensation of justices of the peace, and it would be just as absurd to say that after a person had recovered a judgment in a justice court, and after the costs had been assessed to and paid by the defendant, that the plaintiff should be required to pay to the justice a fee for turning the money over to him.

In case of the wilful violation of the provisions of sections 10 and 11 of this law by a justice of the peace, your remedy

could be either by civil or criminal proceedings, as you might prefer.

Yours respectfully,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

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## KEEPING OF LAKES—LICENSE.

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**Any person keeping a lake for the purpose of selling fish, or charging people for the privilege of fishing therein, must take out a State license.**

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Denver, Colo., October 22, 1903.

HON. J. M. WOODARD,
Game and Fish Commissioner,
State Capitol.

Dear Sir—In reply to your favor of the 21st inst., as to the right of a person, without taking out State license therefor, to keep a private lake stocked with fish, protected by the laws of the State of Colorado, within this State, for the purpose of either selling the fish, or charging people for fishing therein and taking fish therefrom, I beg to refer you to Division C of the Game and Fish Laws of this State, Session Laws of 1899, at page 194.

Section 1 provides that:

"No person shall have in possession or keep or retain in captivity in any park, enclosure, lake or body of water, public or private, any living game or fish, unless the person having such possession, or the proprietor of such park, enclosure, lake or body of water shall procure a license therefor, as hereinafter provided," etc.

Section 2 provides:

"Any park, enclosure, lake or body of water maintained in violation of this act shall be deemed a continuing public nuisance, and may be abated as provided by law for the abatement of public nuisances and the game therein liberated," etc.

Section 3 provides:

"No person shall transport or sell, keep or expose or offer for transportation or sale any game or fish taken from any park, enclosure, lake or body of water, public or private, unless

the same be licensed as provided in this act, and then only as provided in this division, and this section shall apply to game and fish held by private ownership as well as to game and fish the ownership of which may be acquired under this act."

Section 4 provides:

"The provisions of this division in relation to private parks and lakes, the licensing thereof for the keeping and propagation of game and fish therein, and permitting the sale thereof, shall apply to every park or lake in whole or in part on land held by private ownership, and to every lake, the water of which, or the right to the use of such water, in whole or in part, has been or may hereafter be acquired under the laws of this State, or of the United States, for irrigation purposes, and the owner of such land or water right shall be deemed the proprietor of such park, or lake, and of the game or fish therein, and such lakes shall be designated as class A."

Section 5 provides:

"Any person having already established or desiring to establish and maintain a park or lake, public or private, for the purpose of keeping or propagating and selling the game or fish therein, or to be placed therein, shall apply in writing to the Commissioner, stating the name, location, extent and proprietorship of game or fish kept or desired to be kept therein, the term for which the license is desired, and enclosing the fee therefor, and if upon examination by the Commissioner it shall appear that the application is in good faith, and in other respects proper and reasonable, he shall grant to such applicant a license therefor.

Section 6 gives the form of license to be issued.

From the above it will be seen that any person keeping a lake for the purposes mentioned in your letters, as above referred to, must take out a State license therefor.

Respectfully,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General..

## GAME AND FISH COMMISSIONER—TERM OF OFFICE OF.

**The term of office of the game and fish commissioner begins February 1, and continues for a term of two years, except in filling a vacancy, when it continues only for the remainder of the biennial period.**

Denver, Colo., February 2, 1903.

HON. JAMES H. PEABODY,
Governor of Colorado,
Capitol Building.

My Dear Sir—"What is the construction of section 1, chapter 98, Laws 1899, in relation to the commencement and termination of office?"

"Immediately upon the passage of this act, and every two years thereafter, the Governor shall, by and with the consent of the Senate, appoint some person skilled in matters relating to game and fish, to be the State Game and Fish Commissioner, who shall be the head of the department. The Governor may at any time remove the Commissioner for cause, and in vacation of the Senate may fill any vacancy in the office by appointment in writing, filed with the Secretary of State. The Commissioner shall be a resident and citizen of this State, and shall hold his office for the term of two years, or until his successor shall be appointed and qualified. All such appointments shall expire on February 1. The Commissioner shall receive a salary of $1,800 per annum, together with his reasonable and necessary traveling expenses, not exceeding $600 per annum."

The second sentence provides for removal for cause and the appointment of a successor, and then follows the declaration that he shall hold his office for the term of two years, or until his successor shall be appointed and qualified, and then follows the independent sentence:

"All such appointments shall expire on February 1."

There is nothing in the last sentence which limits its application to appointments for vacancies. It appears to apply to the whole statute without restriction, and there is nothing inconsistent in giving it such application.

My judgment is that the Governor was required to make an appointment immediately after the passage of this act, and every two years thereafter, meaning biennially, and not two years to the day after the original appointment.

I believe I am further justified in this construction from the fact that it is possible vacancies will occur within the first year, and previous to the first of February in the first year of service,

and if so, it would not be seriously contended that that appointment would end on February 1st, immediately following the appointment.

The statute means all such appointments, whether for the full term or partial term, shall expire on February 1st. The appointment for the vacancy is to fill it, and not to fill a portion of the term, and this seems to be supported by the decisions in Monash vs. Rhodes, 11 Colo. App., 404, and affirmed in 26 Colo., 321.

If a vacancy occurs, the appointment is to fill the vacancy and to last to the 1st of February ending the ferm. As I have suggested, it is possible that a vacancy could occur where the person appointed to fill it must pass over the 1st of February, and go out of office only on the 1st of February succeeding. That is, he may pass over one February.

Yours respectfully,

N. C. MILLER,
Attorney General.

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## GAME AND FISH LAW.

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**A non-resident must take out a non-resident's license to hunt unprotected game in this State.**

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Denver, Colo., November 12, 1904.

MR. L. S. THOMPSON,
Red Bank,
New Jersey.

Dear Sir—In reply to your favor of the 24th ult., concerning the legality of the action of the game warden of this State in requiring non-residents to take out a license to hunt bear, lion, lynx and coyotes, I beg to say that section 4 of division G of our game laws is as follows:

"No person not a bona fide resident of this State, shall engage in hunting therein without a non-resident's license, and the commissioners or county clerk may require satisfactory proof of residence from any person claiming to be exempt from the operation of this section."

The language of the section is so plain that the commissioners would not be justified in putting any other construction upon it; and as to the right of the State to make such laws, there can be no question.

Allen vs. Wyckoff, 48 N. J. L., 90.
In re Eberle, 98 Fed., 295.

Canfield vs. Coryell, 4 Wash. C. C., 371.
Haney vs. Compton, 36 N. J. L., 507.
State vs. Corson, 50 Atl., 780.
Geer vs. Connecticut, 161 U. S., 529.
McCready vs. Virginia, 94 U. S., 248.

It is possible that attorneys you consulted advised you that from the context the Legislature did not intend to require a license from any one to hunt unprotected game. However this may be, it is the duty of the game warden to carry out the plain letter of the statutes and leave such fine distinctions to the courts.

Yours very truly,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

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## INHERITANCE TAX.

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**Life estate to father, mother, husband, wife, brother, widow or son, or a lineal descendant with remainder to collateral heir of decedent, or to a stranger, or body politic or corporate, is exempt; whereas, if the remainder is to the lineal heirs, it is subject to tax.**

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Denver, Colo., November 18, 1904.

MR. THOMAS L. BONFILS,
Clerk County Court,
Denver, Colorado.

Dear Sir—I have examined into the question about which we were talking yesterday.

This related to the exemption of the life estate going to the mother. If I understood the matter correctly, the remainder goes over to the lineal descendants.

The case of Augusta S. Billings vs. The People, 189 Ill., 72, seems to settle the matter. The court there decided that the only life estates exempt from the inheritance tax are those which go the father, mother, husband, wife, brother, sister, widow of the son or a lineal descendant, where the remainder is to go to a collateral heir of the decedent or to a stranger in the blood or a body politic or corporate.

While the second section of the law makes life estates subject to tax where the remainder is to go to lineal heirs, but exempts such estate where the remainder is to go to the collateral heirs, this does not arbitrarily discriminate against members of a class. In other words, the life estate goes to the mother and the remainder is over to the lineal descendants or direct heirs of the decedent. Then the life estate is taxed at its estimated value and the remainder at its estimated value.

I trust this will cover what you have in mind. I will say further that our law is taken literally from the Illinois law on this subject, and therefore the decisions of Illinois will govern in Colorado.

Yours truly,

N. C. MILLER,
Attorney General.

## INHERITANCE TAX.

Moneys received under the inheritance tax law should be credited to the fiscal year during which such person died.

Denver, Colo., May 25, 1903.

HON. WHITNEY NEWTON,
State Treasurer of Colorado,
Capitol.

Dear Sir—In reply to your letter of May 12th, asking me for an opinion as to the year to which the inheritance tax is to be credited, I answer as follows:

Section 23, page 51 of the Revenue Laws of 1902 settles this matter. It provides that the tax shall be due and payable at the death of the decedent, and shall bear interest from his death at the rate of six per cent. per annum. Therefore, under a familiar principle of law, the money belongs to the fiscal year in which the man died, and you will so credit it.

Respectfully,

N. C. MILLER,
Attorney General.

## COUNTIES LIABLE FOR GIRLS SENT TO INDUSTRIAL SCHOOL.

**The law in regard to the State Industrial School for Girls is constitutional in all particulars, and the several counties are liable for the expense attending the commitment of girls to the Industrial School from date of commitment to date of discharge at the rate of fifty cents per day.**

Denver, Colo., August 3, 1903.

HON. JAMES H. PEABODY,
Governor of Colorado,
State Capitol.

Dear Sir—In reply to your written request of the 3d instant, for an opinion as to the constitutionality of the law in regard to the State Industrial School for Girls, and more particularly as to that portion of the law making each county from which any girl is committed to said school liable for the expense attending the safe keeping, care, maintenance and instruction of such girl, I wish to say that I consider the law constitutional in all its parts.

Whatever might have been the earlier opinions as to the constitutionality of acts similar to this one, modern authorities have universally held that such laws are well within the police power of a state; and that it is not only the right, but it is the imperative duty, of every enlightened government to provide suitable institutions for the reformation of youthful offenders against its laws, as well as for those who are beyond the control of their parents and guardians, so that by careful discipline and restraint, and thorough instruction in useful employments, they may become helpful and honorable members of society.

The present law was enacted by the Eleventh General Assembly, Session Laws 1897, page 68, although a similar law has been upon our statute books since 1887, 1 M. A. S., 2187-2200.

The Act of 1897, in brief, provides for the establishment of a State Industrial School for Girls who have been convicted of any offense known to the laws of the State, and punishable by fine and imprisonment, or both, except such as may be punishable by death or imprisonment for life; and including, also, such girls as shall be adjudged by the County or District Court, or the judge thereof, as incorrigible, or as growing up in habits of vice and immorality; and that such girls shall be retained in such institutions, either until they are reformed, or discharged by the rules of said institution, or have reached the age of twenty-one years.

Section 6 provides that the board of control therein provided for shall be the legal successor of the board theretofore appointed, and that during the years 1897 and 1898, and until sufficient money shall have been thereafter appropriated by the General Assembly, the counties from which said girls have been, or shall be, severally sent and committed, shall be liable for their respective safekeeping, care, maintenance and instruction in all respects and in like manner as provided by section 14 of the Act of 1887.

Section 14 of the Act of 1887 provides that the county from which any girl shall be committed under the provisions of that act shall be liable for the expenses attending her safe keeping, care, maintenance and instruction; and that, at its first meeting in every month the board shall audit and allow the accounts of the reformatory institutions with which contracts have been made for the keeping of such girls, and shall transmit the same to the boards of county commissioners of the several counties liable, and such boards of county commissioners shall issue warrants therefor, payable to the proper person.

Section 1, page 351 of the Session Laws of 1899, provides that each county committing any girl to the State Industrial School for Girls shall be liable for the expense attending her safe keeping, care, maintenance and instruction, and shall pay therefor the sum of fifty cents per day; and that at its first meeting in every month the board of control shall prepare and transmit to the respective counties so liable a certificate showing in detail the person or persons on whose account such expense was incurred, and the amount due thereon for the preceding month; and the board of county commissioners of each of such counties shall pay the same to the State Industrial School for Girls the same as any other current expense of said county.

This latter section was amended by the Fourteenth General Assembly so as to make each of such counties liable for the fifty cents per day for each girl from the time of her commitment until the time of final discharge.

Similar laws to our own have been enacted in nearly all the states, and in many of them the law has been attacked on the ground that it is not only in conflict with various provisions of the State Constitution, but in conflict with the Constitution of the United States as well. The law, however, has been held constitutional upon the broad ground that it is the unquestioned right and the imperative duty of the sovereignty, in its character of parens patriae, to make provision for the care of subjects or citizens, unable from any cause to care for themselves, or when they are without the needed or necessary care of parents or guardians, or when they are a menace to others, or to the welfare of society.

The leading cases of the United States in which these laws have been attacked upon the various grounds above referred to, and have been passed upon in well considered opinions are:

Milwaukee Industrial School vs. Supervisor of Milwaukee County, 40 Wis., 328.

Ex parte Crouse, 4 Whart., 9.

People vs. Governors, etc., 18 How. Pr., 409.

Roth vs. House of Refuge, 31 Md., 329.

Prescott vs. State, 19 Ohio St., 184.

Petition of Ferrier, 103 Ill., 367.

The statute of Wisconsin, discussed in the case of Milwaukee Industrial School vs. Supervisor of Milwaukee County, supra, is practically the same as our own law, and it was attacked in this case upon the ground that it was unconstitutional, as being in contravention of several provisions of the State Constitution, and the court, in passing, at page 703, uses the following language:

"We live in a time of inquiry and innovation, when many things having the sanction of the time are questioned, and many novelties jarring with long accepted theories are proposed. In political science there are those who would reduce government to a mere skeleton of absolutely necessary powers, purely political, and those who favor paternal government, recognizing in the sovereignty much of the authority of patriarchal rule. All this is seen chiefly in political discussions; but the late reports show that these conflicting theories are finding their way into judicial tribunals. The business of the courts, however, is not to correct, but to administer the existing system of government.

"Some authorities cited in this case, and the logical tendency of part of the argument, would go to question the right of the State to make involuntary provision for the care of the destitute, whom misfortune or folly have rendered incapable of caring for themselves. But the political necessity and duty of the sovereignty to make provision for the care of subjects or citizens, unable for any cause to take care of themselves, and destitute of other care, has been too long recognized in all civilzed countries, too well established under the State governments of this country, to be regarded as an open question. All public asylums, here and elsewhere in the country, for the poor, for the insane, for the orphans, for the helpless and destitute for any cause, are witnesses to the political necessity of public charity. And we assume as a principle underlying every consideration in this case, that it is the duty and policy of the State to provide efficient means, in its discretion, for the care of all destitute persons within it; that public charity, in such cases, is a public necessity."

The Wisconsin statute also provided that the child so kept and maintained in such school should be kept at the expense of the county until twenty-one years of age, or until earlier discharged, as provided in the act.

The court passed upon the following points and held, in brief, that the statute in authorizing specified courts and magistrates to cause pauper, disorderly or vagrant children to be brought before them and committed to a state industrial school, is not invalid because it forces children destitute by misfortune or poverty and children guilty of offenses to be alike committed to the industrial school, nor is it invalid because it involves any improper interference with the relation of parent and child.

Under a similar statute of Pennsylvania, in the case of ex parte Crouse, supra, the law was attacked as unconstitutional on the ground that it authorized the committal and detention of an infant without a trial by jury, and so was in contravention of the Bill of Rights.

The court, in passing upon this point, at page 11, uses the following language:

"The House of Refuge is not a prison, but a school. Where reformation, and not punishment, is the end, it may indeed be used as a prison for juvenile convicts who else would be committed to a common gaol; and in respect to these, the constitutionality of the act which incorporated it, stands clear of controversy. It is only in respect of the application of its discipline to subjects admitted on the order of the court, a magistrate, or the managers of the alms house, that a doubt is entertained. The object of the charity is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influence of improper associates. To this end, may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the parens patriae, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that, of strict right, the business of education belongs to it. That parents are ordinarily entrusted with it, is because it can seldom be put in better hands; but when they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held, as they obviously are, at its sufferance? The right of paternal control is a natural, but not an unalienable one. It is not excepted by the declaration of rights out of the subjects of ordinary legislation; and it consequently remains subject to the ordinary legislative power, which, if wantonly or inconveniently used, would soon be constitutionally restricted, but the competency of which, as the government is constituted, can not be doubted. As to abridgment of indefeasible rights by confinement of the person, it is not more than what is borne,

to a greater or less extent, in every school; and we know of no natural right to exemption from restraints which conduce to an infant's welfare."

In Prescott vs. State, supra, a statute of Ohio, very similar to our own, was attacked on the ground that it was in conflict with article V of the amendments to the Constitution of the United States, and was also in conflict with the provisions of the state Constitution in regard to the preservation of the right to trial by jury, and to the rights of accused in criminal cases; but the court held that the provision of the United States Constitution does not operate as a limitation of the power of the state governments over their own citizens, but is exclusively a restriction upon federal power; and that it does not conflict with the provisions of the state Constitution, in that it was neither a criminal prosecution, nor a proceeding according to the course of the common law, in which the right to a trial by jury is guaranteed. The court further held that the proceeding was purely statutory, and the commitment was designed, not as a punishment for crime, but to place minors of the description, and for the causes specified in the statute under the guardianship of the public authorities named for proper care and discipline until they have reformed, or arrive at an age of majority; that the institution to which they were committed was a school, not a prison; nor was it affected by the fact that juvenile convicts were also sent there, who would otherwise be condemned to confinement in the common jail or penitentiary.

In Maryland a statute very similar to our own conferred the power upon justices of the peace to commit minors charged with incorrigible or vicious conduct to the House of Refuge, and the court, in Roth vs. House of Refuge, supra, held the act to be constitutional.

In Illinois the statute conferred upon County Courts the power to commit to the Industrial School dependent infant girls who beg or receive alms, or who have no permanent place of abode or proper parental care or guardianship, or who live or consort with people of bad repute; and it made the county from which they were sent liable for the payment of $10 per month for each girl.

The court held the act constitutional, although it did not pass upon the constitutionality of the county's liability, and held that the court's jurisdiction was of the same character as that exercised by courts of chancery over the person and property of infants, having its foundation under the prerogative of the crown flowing from its general power and duty as parens patriae to protect those who have no other competent protector.

It will be seen by the above authorities that there has never existed any serious doubt as to the constitutionality of that provision of those acts providing for trial by jury of youthful

offenders against the laws of the state, and sentencing them to an industrial school of this description; but questions have been raised as to the constitutionality of those provisions granting the power to the court or judge, without a jury trial, of sentencing incorrigible girls, or those without suitable parents or guardians to such school; and granting the power to the Board of Control to determine the length of the restraint in each case; and to the absence of a requirement in the statute compelling notice to be given to the parents or guardians; and to that provision making each county liable for the expense attending the safe keeping, care, maintenance and instruction of those girls sent from its jurisdiction.

All of these points have been passed upon in the cases above cited, and declared to be constitutional, except that provision of the act making counties liable for the expense attending the inmates sent from them.

Section 1, article VIII of the Constitution of the State of Colorado gives the Legislature ample power to provide for and protect this class of persons. It has been repeatedly held by the courts that the Legislature may make such disposition of the county revenues as it may deem proper.

4 Am. & Eng. Enc. of Law, 350, 371.

Beach on Public Corporations, section 723.

People vs. Williams, 8 Cal., 97.

People vs. Powers, 25 Ill., 169.

Sangamon Co. vs. Springfield, 63 Ill., 66.

Marion Co. vs. Lear, 108 Ill., 343.

In my opinion, the case of Williamson vs. The Board of County Commissioners of Arapahoe County, 23 Colo., 87, not only settles this latter question in the affirmative, but also practically sustains the constitutionality of the entire law under discussion.

In the Williamson case a writ of error issued from the Supreme Court to review the action of the County Court in refusing an application for an order to be made sending William T. House to the Keeley Institute at Denver at the expense of the county in accordance with the provisions of chapter 74 of the laws of 1895.

The County Court denied the order solely upon the ground that the act was unconstitutional; the contention of the defendant in error being that it was in conflict with section 34, article V; section 35, article V; section 1, article VIII; section 1, article XI, and section 2, article XI of the Constitution of the State of Colorado; thus embodying most of the grounds urged against the constitutionality of the act in regard to the State Industrial School for Girls.

The court held, in brief, that legislative enactments, the object of which is to provide for the comfort and well-being of such persons as by reason of infancy, defective understanding, or other misfortune or infirmity, are unable to properly care for themselves, are not to be interfered with, unless some constitutional limitation plainly and unequivocally requires it, and that we have no such constitutional provision.

And that the constitutional provision that no appropriation shall be made for charitable, industrial, educational or benevolent purposes, to any person, corporation or community, not under the absolute control of the State, has reference to State money only, and does not inhibit the Legislature from conferring upon counties the power to use county funds for the treatment and cure of their indigent inebriates, as provided by the act of 1895.

The only question remaining, therefore, is whether the Legislature intended counties to be held liable for the fifty cents per day for each girl therefrom, as provided for by section 1, Session Laws of 1899, page 351, while said girl is on parole from the Industrial School.

While the act of 1903, cited in full, supra, specifically states that the expense attending the safe keeping, care, maintenance and instruction of such girls, until they have been finally discharged by the board of control, shall be paid by the county at the rate of fifty cents per day for each girl, I do not think this amendment in any manner changed the intention of the former law, but simply affirmed in clearer language the law already existing.

It will be noticed by a careful reading of the entire law that no other provision has been made for the expense attending the safe keeping, care, maintenance and instruction of such girls; and while it is true that when on parole they are probably self-supporting in most instances, the officers must be paid for keeping a supervisory care and control over them; and if it should occur, which is possible, that all the girls sent to such school be out on parole, the institution would be left without any funds with which to pay its officers or carry on its business, a condition certainly never intended by the Legislature.

However, I do not think any forced construction is necessary to be given either section 14 of the act of 1887, supra, section 6 of the act of 1897, supra, or section 1 of the act of 1899, supra, to clearly show the intention of the different Legislatures to make the several counties liable for the expense attending the commitment of girls to the Industrial School from the date of their commitment to the date of their discharge from said school, and the act of 1899, supra, simply fixed the amount of compensation to be paid. And in my opinion any other construction would cer-

tainly be a forced one, and not in harmony with the general purpose and tenor of this law.

Respectfully submitted,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

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## DISABLED INMATE OF INDUSTRIAL SCHOOL.

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Where inmate of Industrial School becomes disabled, so that he can not earn his own living, he should be returned to his parents, who are obliged, under the law, to support him. He is not a charge upon the county in which the institution is situated.

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Denver, Colo., February 1, 1904.

MR. FRED L. PADDELFORD,
Superintendent State Industrial School,
Golden, Colo.

Dear Sir—I am in receipt of your letter of January 26, and in reply will say:

From your letter it appears that:

"One George Merritt was sentenced to this school by the district judge of the county in which Cheyenne is situated, and was received at this school March 2, 1898. In 1899 he was injured by the caving in of a root cellar that he and some other boys were digging under the supervision of an officer. His spine was injured so badly that he has ever since been unable to do any work, and one ankle and foot have been constantly in a bad state. In short, he will never be able to do any work to support himself.

"His time expired September 2, 1903, since which time he has been kept at the school and cared for as before. His mother and stepfather refused to receive him unless 'he were able to make his own living.'

"The Board of Control has instructed me to seek your advice concerning the proper disposition of the case. The young man ought not to be kept with the other boys because his presence has a demoralizing effect upon their conduct and welfare. His physical condition precludes a forcible compulsion of obedience in his case, though his disobedience consists more in using vulgar

and reckless language when alone with other boys than in anything else."

You ask, first: "Should he be returned to the county from which he was received; and if so, to whom?"

Second: "Or is he properly a charge upon the county in which this school is situated?"

The State Industrial School is a place of detention for boys who are found guilty under the age of sixteen years of violating some statute or law of the State. It is a penal institution. The boy's home remains in the county from which he was sentenced. He should be returned to the county from which he was received, and to his parents in that county. Specifically, I would advise you to direct some officer of your institution to take and convey him to his home and there leave him. His parents must, under the law, support him.

Second. In reply to the second proposition, I would say that he is not a charge upon the county in which the school is situated.

If the boy is entitled to indemnity for the injury suffered by him, that is a matter for the Legislature to solve.

The State Industrial School is not a place of detention for cripples or poor persons. It is a penal institution. Our State seems to have no place for the detention and care of cripples who are poor.

Yours respectfully,

N. C. MILLER,
Attorney General.

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## RE-INSURANCE.

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Denver, Colo., June 18, 1903.

HON. FRANK TESCH,
Deputy Superintendent Insurance,
State Capitol.

Dear Sir—In reply to yours of the 17th inst., in reference to the construction of section 2, chapter 127 of the Session Laws of 1899, I would say that I think your construction of that section is correct, and that you have no power to rule that any fire insurance company can re-insure the whole or any part of a risk taken out on property in this State in any other company not authorized to do business in this State.

The papers submitted with your letter are herewith returned.

Yours truly,

N. C. MILLER,
Attorney General.

## INSURANCE—LOCAL ADVISERS.

**Local advisers, so called, should be required to take out a license. Local advisers' contracts, so-called, are not in violation of the law so long as they are made use of in accordance with their express terms.**

Denver, Colo., March 12, 1904.

HON. FRANK S. TESCH,
Deputy Superintendent of Insurance,
State Capitol.

Dear Sir—I am in receipt of your communication of January 22, 1904, in regard to complaints having been made to your department that certain life insurance companies doing business in this State are violating the provisions of section 2232 of Mills' Annotated Statutes in appointing and issuing policies of insurance to so-called "local advisers," and asking an opinion from this office as to whether or not this manner of doing business is in violation of said section, and if so, in what the violation consists; or, if not in violation of said section, should such advisers be required to take out a license in accordance with the provisions of section 2216 of Mills' Annotated Statutes?

I also received from you copies of the application for appointment as "local adviser," the contract made with the adviser, the policy issued to him, the inquiries made of the adviser concerning applicants for insurance, and the typewritten estimate of results as used by The Security Trust and Life Insurance Company of Philadelphia, which I am informed is practically the same as those of all other companies in this State having this system in vogue.

In accordance with your suggestion a hearing, after due notice, was given to the representatives of the different insurance companies, together with their attorneys, at my office on the 29th ult., in order that the facts and the rulings of the Attorneys General and the courts of other states might be fairly presented by both parties to the controversy.

The application for appointment as special adviser is, in substance, that the applicant agrees to assist the said company by furnishing confidential information in regard to the characand habits of prospective applicants for insurance, or re-instatement, and also such information coming to the adviser's knowledge as may tend to protect the company from false or fraudulent claims. It is further specially stipulated that the special

adviser shall not be required, as a condition precedent for securing his appointment, to take out a policy of insurance.

The contract provides that the number of local advisers shall be limited to one hundred in this State; that no other series shall be issued; that the compensation of each for the services as above rendered shall be determined on the first day of October of each year by dividing among them an amount of money equal to one dollar for each one thousand dollars of insurance then in force, written in the State of Colorado, within a period of ten years from and after October 1, 1903, upon which there shall have been paid in cash during the preceding year one full annual premium, two semi-annual or four quarter-annual premiums; and that the amount so determined shall be paid each year to the adviser so long as he carries out his portion of said agreement and there remains in force $5,000 of insurance placed by his efforts or assistance.

The application for insurance and the policy issued to the insured is the same in all respects for an adviser, who takes out insurance, as for any other person of the same class and expectation of life who is not an adviser, the same rate and premium being charged in each instance.

It is alleged upon the part of the complainant that this system is used by the companies complained of for the purpose of soliciting insurance which they could not otherwise get, by practically giving the insured a rebate from the regular premium, and thus violating the provisions of section 2232, supra, by discriminating between the insured; and they refer to the application, advisory contract, estimate and insurance policy, above referred to, as evidence of such facts. Upon the other hand, it is claimed by the respondent companies that they make no other agreement contract or representations than those plainly set forth in writing, and that they often issue advisory contracts to persons who never carry insurance with them, but only influence others to do so. Thus we have only to determine whether these contracts upon their face constitute a violation of the statute.

Section 2232, above referred to, provides, in substance, that no insurance company shall make or permit any distinction or discrimination between persons insured in the same class with equal expectations of life, in the amount of premiums paid, or rates charged, or in the dividend or other benefits derivable therefrom, or in any other manner; nor make any contract or agreement in regard to such matters other than those plainly expressed in the policy; nor allow as an inducement to insure, any rebate premiums payable on the policies, or any special favors or valuable considerations not specified in the policy contract.

Several states have a similar statute to this one, but so far as I have been able to find only the courts of Indiana, Rhode Island and Michigan have passed directly upon this question.

Muller vs. State L. I. Co., 27 Ind. App., 45.
Quigg vs Coffy, 18 R. I., 757.
State L. I. Co. vs. Strong, 127 Mich., 346.

The facts in each of these cases are similar to the facts in this, with the exception that in the Michigan case oral evidence was introduced to show that the advisory contract was only used as a subterfuge to evade the law, and it was so declared by the court; while in the two former cases the advisory contract was held to be entirely separate and distinct from the policy and contract of insurance, and was, therefore, held not to be in violation of the statute.

The Attorney General of Pennsylvania, in passing upon this point, in an opinion rendered the Commissioner of Insurance of his State, upon date of December 11, 1903, holds that the advisory contract constitutes a violation of the statute, and cites in support thereof the Michigan case above cited. However, I can not agree either with his logic or his interpretation of the Michigan courts' decision.

The certificate issued to the local adviser and the application therefor forms a complete contract of employment between him and the company. The compensation therein provided may be collected by him in an action at law; and on the other hand the company may annul the contract and be released from liability whenever he fails to carry out its terms upon his part. He is required, upon written request of the company, to furnish information as to the character and habits of prospective applicants or of those desiring reinstatement; and, further, at all times he obligates himself to furnish such information as may come to his knowledge that may tend to protect the company against fraudulent claims. I do not believe it would be just to say that such services would constitute no consideration for the compensation offered. On the other hand, I am sure the ordinary business man would not agree to perform the services therein enumerated without compensation, and this being true, the sufficiency, or insufficiency, of such compensation is a question to be determined by the parties to the contract only. Further, it can readily be understood how valuable even the name and good will of some prominent and influential man as "local adviser," so-called, would be in a community in the way of establishing confidence in a company and thus increasing its business.

The application for, and the policy of insurance together form the contract of insurance, and are used alike for "special advisers" and others. The policy issued to a "special adviser" in no way depends upon his being or remaining such, but con-

tinues in force so long as he pays the premiums thereon. The contract of insurance can be enforced in a court of justice by the "special adviser" the same as by any other policy holder, and entirely independent of the fact whether such advisory contract is still in force or has been forfeited by his failure to perform the conditions therein imposed upon him.

From the very nature of the insurance business there are many ways by which the provisions of section 2232, supra, may be violated, and certainly "special adviser's contracts" may, but not necessarily so, be used for this purpose. However, I believe that the fact of whether or not it is used for such purpose should be proven in the particular case called to the attention of your department, and the company or agent making such use of it should be prosecuted and punished according to the provisions of said section.

As before stated, no other evidence of the violation of said statute by those companies complained of has been presented for my consideration than the written contracts above set forth, and, in my opinion, such contracts, in themselves, constitute no violation of said statute.

While it is evident that the adviser's contract may be made use of to violate the terms of the above statute, yet, so long as it is only made use of in accordance with its express terms to employ those who are, in reality, but solicitors for its business, or agents to look after its interests, those companies who use such contracts for such legitimate purposes, are entitled to protection in this State.

Section 2216 of Mills' Annotated Statutes provides that it shall be unlawful for any person, company or corporation in this State, either to procure, receive, or forward applications for insurance in, or to issue or deliver policies for any company or companies not having complied with the provisions of this act, or to adjust any loss, or in any manner, either directly or indirectly, to aid in the transaction of the business of insurance with any such company, unless duly authorized by such company and licensed by the superintendent of insurance, in conformity with the provisions of this act.

It will be observed, therefore, that such person acting as an adviser to any insurance company or its agents in this State, as above set forth, comes within the provisions of the above section, and should be required by your department to take out a license in accordance with its terms.

Yours respectfully,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

## MUTUAL BURIAL ASSOCIATION.

**A mutual burial association, organized under the assessment plan, and having paid agents to solicit membership or collect assessments, is an insurance association within the meaning of sections 2237, 2238, 2245 and 1379a.**

Denver, Colo., March 3, 1903.

MR. FRANK S. TESCH,
Deputy Superintendent Insurance,
Denver, Colorado.

Dear Sir—Replying to your letter of the 2d inst., submitting the articles of association and by-laws of The Harrison Mutual Burial Association, of Pueblo, and also the by-laws, announcement and certificate of membership of the National Co-operative Burial Association, of Pueblo, and two letters, dated February 24th and 28th, respectively, from Devine and Dubbs, attorneys for The Harrison Mutual Burial Association, together with copies of your two letters of February 13th and 26th respectively, to Devine and Dubbs, for my opinion as to whether these associations, or either of them, come under the jurisdiction of the Insurance Department of the State, and whether or not they are violating sections 2237, 2238, 2245 and 1379a, of Mills' Annotated Statutes.

Section 2237, Mills' Annotated Statutes, defines what is insurance on the assessment plan, but expressly excepts from that definition insurance which otherwise would be within the definition, but which is sold or issued by "organizations which do not employ paid agents in soliciting business."

If an organization, as a matter of fact, therefore, does not employ paid agents in soliciting business, it does not come within the requirements of that act entitled "An Act Relating to Life and Casualty Insurance on the Assessment Plan," approved April 20, 1887, Session Laws of 1887, page 284, et seq., of which section 2237, Mills' Annotated Statutes, is the first section.

It is for you to determine in the first instance, whether, as a matter of fact, any particular association, organization or company does employ paid agents in soliciting business, and if you have facts sufficient to sustain a case of violation, to report the facts to the Attorney General for his action in accordance with section 4 of said act, being section 2240 of Mills' Annotated Statutes.

Section 2245, M. A. S., being section 9 of the said act, prohibits any corporation from doing business under said act, and

from issuing a certificate or policy upon the life of any person more than 60 years of age.

If, therefore, a corporation or organization is not doing business under the act, such prohibition does not exist against such corporation or organization.

As to the remaining portion of your inquiry as to whether either or both of the above named associations, in issuing certificates of membership, as they are called, to infants or minors under ten years of age, are violating section 1379, M. A. S., I would say that I am of the opinion that they are violating said section, which makes it "unlawful for any corporation, company or person to establish or conduct within the State of Colorado, the business of insuring or causing to be insured by any corporation, company or person, any infant or infants, or any minor who shall be under the age of ten years," and by the by-laws and articles of association of both the above named associations, they do insure infants under the age of ten years, the benefits being payable upon their death.

I think, therefore, that the matter should be reported to the district attorney of the proper district for his action in the premises, that a test case may be made under this act against the insurance of infants, particularly as the wording of the entire section is somewhat ambiguous.

The papers submitted are herewith returned.

Yours respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

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## NATIONAL BURIAL ASSOCIATION.

Denver, Colo., May 12, 1904.

HON FRANK S. TESCH,
Deputy Superintendent Insurance,
State Capitol.

Dear Sir—In reply to your letter of the 5th inst. in regard to the National Co-operative Burial Association, of this State, doing an insurance business in violation of our insurance laws, I beg to refer you to the former opinion rendered by this office under date of March 3, 1903, as follows:

"Replying to your letter of the 2d inst., submitting the articles of association and by-laws of The Harrison Mutual Burial Association, of Pueblo, and also the by-laws, announce-

ment and certificate of membership of the National Co-operative Burial Association, of Pueblo, and two letters, dated February 24th and 28th, respectively, from Devine and Dubbs, attorneys for The Harrison Mutual Burial Association, together with copies of your two letters of February 13th and 26th respectively, to Devine and Dubbs, for my opinion as to whether these associations, or either of them, come under the jurisdiction of the Insurance Department of the State, and whether or not they are violating sections 2237, 2238, 2245 and 1379a, of Mills' Annotated Statutes.

"Section 2237, Mills' Annotated Statutes, defines what is insurance on the assessment plan, but expressly excepts from that definition insurance which otherwise would be within the definition, but which is sold or issued by 'organizations which do not employ paid agents in soliciting business.'

"If an organization, as a matter of fact, therefore, does not employ paid agents in soliciting business, they do not come within the requirements of that act entitled 'An Act Relating to Life and Casualty Insurance on the Assessment Plan,' approved April 20, 1887, Session Laws of 1887, page 284, et seq., of which section 2237, Mills' Annotated Statutes, is the first section.

"It is for you to determine in the first instance, whether, as a matter of fact, any particular association, organization or company does employ paid agents in soliciting business, and if you have facts sufficient to sustain a case of violation, to report the facts to the Attorney General for his action, in accordance with section 4 of said act, being section 2240 of Mills' Annotated Statutes.

"Section 2245, M. A. S., being section 9 of the said act, prohibits any corporation from doing business under said act, and from issuing a certificate or policy upon the life of any person more than 60 years of age.

"If, therefore, a corporation or organization is not doing business under the act, such prohibition does not exist against such corporation or organization.

"As to the remaining portion of your inquiry as to whether either or both of the above named associations, in issuing certificates of membership, as they are called, to infants or minors under ten years of age, are violating section 1379, M. A. S., I would say that I am of the opinion that they are violating said section, which makes it 'unlawful for any corporation, company or person to establish or conduct within the State of Colorado, the business of insuring or causing to be insured by any corporation, company or person, any infant or infants, or any minor who shall be under the age of ten years,' and by the by-laws and articles of association of both the above named associations, they do insure infants under the age of ten years, the benefits being payable upon their death.

"I think, therefore, that the matter should be reported to the district attorney of the proper district for his action in the premises, that a test case may be made under this act against the insurance of infants, particularly as the wording of the entire section is somewhat ambiguous.

"The papers submitted are herewith returned."

I trust the above opinion will cover all of the questions asked in your letter.

Yours truly,

N. C. MILLER,
Attorney General.

By H. J. HERSEY,
Assistant Attorney General.

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## RENEWAL OF LIFE INSURANCE CHARTER.

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**Foreign life insurance companies, the existence of which is made perpetual in other States, should not be required to renew their articles of incorporation in this State.**

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Denver, Colo., October 21, 1903.

HON. JAMES COWIE,
Secretary of State,
State Capitol.

Dear Sir—In reply to your request for my opinion as to whether the Penn Mutual Life Insurance Company, incorporated under the laws of Pennsylvania, and doing a life insurance business in the State of Colorado; and, in addition thereto, loaning money (presumably their own), should be required to renew their incorporation in accordance with chapter 76 of the Session Laws of 1903, I have to advise you as follows:

I find from an examination of the files in your office that the Penn Mutual Life Insurance Company was incorporated by a special act of the legislature of the state of Pennsylvania, and that its term of existence was made perpetual; that on February 2, 1883, it filed in the office of the Secretary of State of this State certified copies of the act incorporating it, and the acts supplemental thereto, and also filed a certificate of appointment of its authorized agent, upon whom process might be served, and a certificate designating its principal place of business in this State, to comply with the requirements of our statutes then existing in reference to foreign corporations.

By our statutes then in force relating to foreign corporations it was provided that "such corporations shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers."

1 M. A. S., section 499.

While this section has been amended since that time, the same provision upon this point still exists—3 M. A. S., Sec. 499.

It should be noticed that the liabilities, restrictions and duties to which foreign corporations are subjected are the same as those imposed by our statutes upon corporations "of like character."

Chapter 76 of the Session Laws of 1903, relating to the dissolution and renewal of corporations, provides that "no foreign corporation doing business in this State shall be allowed a term of corporate existence of any longer period of existence than domestic corporations of like character, and every such foreign corporation doing business in this State shall be required to file a renewal certificate of its corporate existence and pay the same fees therefor as if such corporation were a domestic corporation organized under the laws of this State."

Section 3, Session Laws of 1903, page 154.

Again, in this section, we find the expression "of like character," so that, in order to answer your question, it becomes necessary to determine what is the term of corporate existence allowed to domestic corporations "of like character" to that of the Penn Mutual Life Insurance Company.

It is provided by our statutes that the term of existence of domestic corporations shall not exceed twenty years, "except as hereinafter provided, save and except to make perpetual corporations insuring the lives of individuals, which have been, heretofore, or may be hereafter, organized under the laws of Colorado." 1 M. A. S., Sec. 473.

It will be seen by this provision that domestic corporations incorporated for the purpose of insuring the lives of individuals may provide in their articles of incorporation that their term of corporate existence shall be perpetual. It follows, therefore, that unless the fact that the Penn Mutual Life Insurance Company is also permitted, by the act incorporating it, to loan money—as you suggest, presumably its own—changes its character, it is "of like character" with domestic corporations insuring the lives of individuals, which may be perpetual in this State, no question as to its term of corporate existence being for a longer period than that of domestic corporations of like character arises.

There is no doubt as to the power of the Penn Mutual Life Insurance Company to loan its money under the act of the Legis-

lature of Pennsylvania incorporating it, and I think that there is no doubt that domestic corporations, incorporated for the purpose of insuring the lives of individuals, would have the same power, whether that power were expressly stated in its articles of incorporation or not, because it is well settled that in the absence of express charter or statutory prohibition, and where it is not inconsistent with the objects for which the corporation is created, that an insurance company, as well as any other company, has the right to loan or invest funds for which it has no present use, instead of allowing them to remain idle and unproductive.

1 Clark and Marshall Private Corporations, Sec. 186.
4 Thompson on Corporations, Sec. 5711.
7 Am. & Eng. Law (2nd Ed.), par. 7, p. 797.

Of course, if domestic corporations for insuring the lives of individuals were not permitted to be perpetual and were limited to twenty years, or to any other specific number of years, then the Penn Mutual Life Insurance Company would have to comply with the provisions of chapter 76 of the Session Laws of 1903, because, not only does section 449 of 1 M. A. S. subject foreign corporations to the same liabilities, restrictions and duties of domestic corporations of like character, but section 3, page 76, of the Session Laws of 1903 expressly limits the term of corporate existence of foreign corporations to the term of corporate existence of domestic corporations of like character.

Iron Silver Min. Co. vs. Cowie (Colo. Sup. Ct.), 72 Pac., 1067.

I am of the opinion, therefore, that the Penn Mutual Life Insurance Company is not required to file a renewal certificate of its corporate existence, because both by the act of the Legislature of Pennsylvania incorporating it and by the statutes of this State it is permitted to be perpetual. I am,

Yours respectfully,

N. C. MILLER,
Attorney General.

By H. J. HERSEY,
Assistant Attorney General.

## LICENSE FOR DETECTIVES.

**All dectectives must take out State licenses, issued by Secretary of State upon direction of the Governor, after application made to the Governor, and bond has been approved and filed.**

Denver, Colo., May 31, 1904.

HON. JAMES H. PEABODY,
Governor of Colorado,
State Capitol.

Dear Sir—In reply to your letter of the 28th inst., enclosing a letter of C. R. Clendening, of Anaconda, as to whether or not it is necessary for him to take out a detective's license, I would say that by section 1537 of the first volume of Mills' Annotated Statutes, it is provided that "no person, firm or corporation shall carry on a detective business within this State without having first obtained a license so to do, in the manner hereinafter provided."

Sections 1538 to 1546 of the same volume of Mills' Annotated statutes contain the further regulations in reference to detectives.

You will notice that the application for license is to be made to the Governor, and the license upon the direction of the Governor, after he has fixed the amount of the bond, and the bond has been filed, and the proper fees paid, is to be issued by the Secretary of State. A reference to the above sections of the statute will enable Mr. Clendening to make the proper application. I might add that by section 3294a a non-resident can not be appointed a peace officer.

I am, therefore, of the opinion that he must take out a license. I am,

Yours respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

## GOVERNMENT OF U. S. MILITARY RESERVATIONS.

**The United States has control of territory within reservation. The enforcement of law outside belongs to State authorities.**

**Dance halls and other places, where women are employed in the sale of spirituous liquors, are contrary to the State statutes. Section 1349, M. A. S., prohibits the sale of spirituous liquors to the United States or State troops.**

Denver, Colo., June 30, 1904.

HON. JAMES H. PEABODY,
Governor of Colorado,
State Capitol.

Dear Sir—In reply to your inquiry of June 27, asking if a military order can be issued prohibiting the establishment of saloons and other places where women are employed, adjacent to the military reservation of Fort Logan, I desire to say:

First. The military have only control of the territory within the boundary lines of the reservation. The enforcement of law outside is with the State authorities.

Second. Dance halls and other places where women are employed in connection with the sale of liquor, are contrary to the statutes of this State.

Third. I desire to call attention to the following statute which probably would be sufficient authority to drive these saloons away if its enforcement is insisted upon by the commander:

"If any person, by himself or his agent, shall knowingly sell, exchange, give, barter or dispose of any spirituous liquors or wine to any of the troops of the United States, or militia of this State, being or serving within the limits of this State, except such supplies as may be ordered by the officers of the United States army, under the direction of the war department, such person, on conviction thereof, shall be imprisoned for a period not exceeding three months, or shall be fined in any sum not exceeding fifty dollars; and such person shall, upon such conviction, also forfeit any license he may have obtained authorizing him to retail spirituous or other liquors."

Section 1349, M. A. S.

I believe this covers the question submitted by your communication. I am,

Yours respectfully,

N. C. MILLER,
Attorney General.

## MILITARY POLL TAX.

**All residents of Colorado, of proper sex and age, are liable for military poll tax, regardless of citizenship.**

Denver, Colo., April 22, 1904.

PAUL WEISS, ESQ.,
1606 Curtis Street,
Denver.

Dear Sir—In reply to your inquiry as to whether residents of Colorado who are not naturalized must pay a military poll tax, I qoute you the statute, which is as follows:

"The county commissioners of each county shall, at the time of levying the tax for county purposes, cause to be levied an annual poll tax of one dollar upon each male inhabitant over the age of twenty-one years, excepting active members of the national guard and such other persons as may be exempt by law. A failure or neglect on the part of the county commissioners to levy such tax shall subject such county commissioners, and each one of said commissioners to a fine of not less than one thousand nor more than five thousand dollars, for the benefit of the military fund; and it is hereby made the duty of the Adjutant General to institute proceedings against such commissioners to recover such fine. The said poll tax shall be assessed and collected in the same manner as is now or may be by law provided for the assessment and collection of other State poll taxes."

Laws '89, pages 399, 400; article VI, section 1.

This statute makes no exceptions, and it is a well-settled principle of law that the support of the government, or any portion of it, may be assessed upon all residents, regardless of citizenship, excepting only the ministers and representatives of foreign countries, who are not engaged in business in the United States.

I will, therefore, decide that residents of Switzerland in Colorado must pay a military poll tax, regardless of naturalization, unless they are merely visitors here.

Yours respectfully,

N. C. MILLER,
Attorney General.

## MILITARY POLL TAX.

Denver, Colo., June 14, 1904.

HON. W. M. BRIDGES,
Assessor Fremont County,
Canon City, Colorado.

Dear Sir—I am in receipt of a letter from you dated May 26, asking my opinion as to the exemptions under section 3082, Vol. II, M. A. S.

I find the following exceptions:

1. Active members of the National Guard and such other persons as may be exempt by law.—3082, M. A. S.

2. Any person who is a working member of any fire engine, hook and ladder or hose company, or voluntary organization for the extinguishing of fire, or who has a certificate of five years' service.—2598, M. A. S.

"That all persons who have served in the army or navy of the United States, and who have been honorably discharged from such service, shall be exempt from enrollment in the militia of this State, and also from payment of any military poll tax levied in this State."—Section 3029, M. A. S.

Section 3764, M. A. S., reads as follows:

"A poll tax shall be assessed on every able-bodied male inhabitant of the State over the age of twenty-one years, and under fifty years, whether a citizen of the United States or an alien."

The foregoing statute may possibly be regarded as repealed by the Revenue Act of 1901. It does not exempt persons over fifty years of age, for the reason that it does not purport to exempt anyone.

The opinions of my predecessors are to be found as follows:

Record 9, page 19, Attorney General Campbell, 1899-1900.

Attorney General Engley, Opinions, page 399, 1892 to 1894.

Attorney General Carr, Opinions, page 230, 1895-1896.

Attorney General Jones, Opinions, pages 14 and 67, 1889-1890.

In the latter opinion the Attorney General holds that a military poll tax is not a lien upon either real or personal property.

Our conclusion, therefore, is that the age should not be regarded as an exemption.

Respectfully,

N. C. MILLER,
Attorney General.

## MILITARY.

**All printing and stationery supplies for the Adjutant General's department and the Insurance Department must be obtained through the Secretary of State.**

Denver, Colo., January 30, 1903.

HON. JAMES COWIE,
Secretary of State of Colorado,
Denver, Colorado.

My Dear Sir—You have submitted two questions on which you ask the legal opinion of this office.

First. Are the printing and stationery supplies of the Adjutant General's office comprehended within the contract let by your office under statute 3663, Vol. 3, M. A. S.?

Second. Are the printing and stationery supplies used in the Insurance Department of the Auditor's office comprehended within the terms of statute 3663, Vol. 3, M. A. S., and the contract let by the Secretary of State?

"From and after the passage of this act, all public printing for the State of Colorado shall be done by contract, and not otherwise, and the Secretary of State is hereby authorized to advertise for thirty days in two daily papers published in the City of Denver, inviting sealed proposals for doing all printing of bills, memorials, resolutions, roll calls, calendars, cards, committee reports, rules of each House, record and other printed blank books, House and Senate journals, reports of State officers, inspectors and commissioners, ready-reference calendars, letter heads, note heads, envelopes and all other necessary printing, and when such proposals shall be opened, it shall be the duty of the Secretary of State to let contracts to the lowest responsible bidders for such items as they may respectively be entitled to by virtue of being the said lowest bidders. Every bidder shall accompany his bid with a guarantee of at least $1,000.00 that he will enter into contracts for such items as may be awarded him at the prices stated in his bid."

M. A. S., Vol. 3, section 3663.

It will be observed from a reading of the foregoing statute that the language is comprehensive and inclusive. It says: "from and after the passage of this act, all public printing for the State of Colorado shall be done by contract, and not otherwise, and the Secretary of State is hereby authorized," etc.

Now, then, unless we can find some exception in the statutes relating to the particular departments under inquiry, viz., the Insurance Department and the Adjutant General's office, we must conclude that the printing and stationery of those offices are comprehended within the statute quoted.

Section 4 provides that all supplies and printing and other things furnished the various officers and boards shall be paid out of the contingent fund, and it is argued from this that, inasmuch as the expenses for printing and stationery in either of those departments are not paid out of the contingent fund, therefore, it does not come within the contract made by the Secretary of State.

If it is true that the act creating the Insurance Department and the Military fund, authorizes and requires the expenses of the two departments to be paid out of the revenues received by them, this provision only amounts to a continuing appropriation for the payment of such expenses. Therefore, it was impossible to refer to either of these departments in an appropriation bill, and the omission to state something in an appropriation bill which it could not possibly contain, does not warrant any presumption. Therefore, it will be impossible to take any appropriation bill into consideration in deciding whether the supplies referred to are covered by the public printing act.

On the other hand, the fact that the printing and stationery used in the Adjutant General's office and in the insurance department are paid for out of special funds, is not a reason for excepting them from the provisions of chapter 103, volume 3, M. A. S.

The application of that chapter is not to be determined by the particular fund out of which bills are to be paid and the act nowhere says that it shall be so construed.

The statute is of general and universal application upon all subjects mentioned within it, and therefore it must cover every department of State, whether the Adjutant General's office or Insurance Department, unless we can find some special statute which has the effect of discharging either of those departments from the limitations of that chapter.

The Adjutant General's office is governed and controlled by chapter 84, volume 2, Mills', and the amendments thereto. This chapter was substantially amended by chapter 63, Session Laws of 1897. This latter act provides for the furnishing of blanks and other papers, but no provision for printing other than the general law in relation to public printing; nothing that would exempt that department from the operation of the general statute in relation to public printing.

There is also an additional chapter, No. 25, Session Laws of 1899, and a careful perusal of all these acts relating to the military department and the Adjutant General's office, does not disclose a line which gives that department control of printing

or purchase of stationery. It must, therefore, obtain its printing and stationery and supplies by requisitions upon the office of the Secretary of State, the same as other departments of the State administration.

## INSURANCE DEPARTMENT.

This department is controlled, first: Under an act approved and in force February 3, 1883, Laws of 1883, page 212, and the statutes passed subsequent thereto, and found in volume 1, M. A. S., at page 1327, and volume 3, at page 643.

I am unable to find in any of these statutes any authority for the Insurance Department to act independently in the procuring of printing and supplies and stationery. The act creating this department, and the statutes amendatory thereto, do authorize the payment of all expenses incurred by it, out of the fees collected. But, surely, no one will contend that because those items are to be paid out of the fees of the office, after they are covered into the treasury, that this is authority to the Auditor or Insurance Commissioner to act independently of the statute requiring all public printing, stationery and supplies to be obtained under contract, and by requisitions upon the Secretary of State. The source of payment has nothing to do with the construction of the chapter in relation to public printing and supplies. Chapter 103 nowhere says that it shall be applicable only to those supplies and stationery and printing which are paid out of a particular fund, but it relates to all departments, regardless of the fund out of which the payment is made.

The necessity and importance of a statute requiring printing, stationery and miscellaneous supplies for the several departments of State to be obtained under contract, has been forcibly impressed upon the public by numerous and repeated attempts at overcharge. The economical purchase of supplies requires that a contract be let for printing, stationery and miscellaneous articles upon competitive bids and the due enforcement of such contract by a rigid adherence to the contract.

The history of our own State shows that where no restrictions are imposed, prices are paid for articles and for printing far in excess of any charges made to individuals or corporations, and without the protection afforded by the statute and the laws referred to, there would be no restrictions where the heads of departments paid excessive and extortionate charges for printing and stationery.

It was undoubtedly the intention of the Legislature that every department of the State should come within the requirements of chapter 103, volume 3, M. A. S., and no reason can be assigned why they should not come within its terms.

The reason which I have heard most frequently assigned why either of these departments should not be governed by that

chapter is, that the expenses are paid out of a particular fund belonging to that office.

But it will be conceded that the fees of the Insurance Department and the military poll tax of the Military Department must also be paid into the treasury of the State of Colorado, and should be paid out only upon proper vouchers presented to the Auditor and warrants drawn by him upon the Treasurer. It is nowhere provided that either of these departments shall first pay their own expenses and then cover the balance of the fund into the treasury, and even if that were true, it will not be admitted that the statute requiring all printing to be done by contract, does not apply.

We therefore advise you that all printing must come within your department, and that the Auditor will not be justified in drawing warrants to pay bills which have not been regularly and legally incurred as defined by this opinion.

Respectfully submitted,

N. C. MILLER,
Attorney General.

## NATIONAL GUARD.

The National Guard in this State is formed by legislative enactment, and not by executive order.

It must consist of one brigade, under command of a brigadier general, who is appointed by the Governor.

The component parts of the brigade may be changed from time to time by the Governor, upon the advice and approval of the military board, provided the limits of the statute are not exceeded.

Denver, Colo., July 16, 1904.

HON. JAMES H. PEABODY,
Governor of Colorado,
State Capitol.

Dear Sir—I have your request for my opinion as follows:

"In making an examination of the laws under which our National Guard is formed I am somewhat confused in definitely determining whether such formation was brought about by legislative enactment or by an executive order. For instance, I find in the law that 'the brigade' shall be composed of certain units of the National Guard; again I find that the staff of the brigadier

general shall consist of certain commissioned officers and again that the military board shall be composed of the Governor, Attorney General, brigadier general, etc. The question arises in my mind as to whether, if these several organizations and officials were created by executive order, if an executive order can disperse them and cancel their commissions, or whether it requires legislative action to bring such a change about.

"I enclose several communications from the Adjutant General's office bearing upon this subject, and in perusing them these matters mentioned have been brought to my mind. Will you please, therefore, examine the question and let me know officially if I am authorized to take any action under the law for making the change in the present organization of the National Guard?"

In reply I will say that the formation of the National Guard of this State was brought about by legislative enactment and not by an executive order.

The present National Guard act is chapter 84 of the Revised Supplement of M. A. S. See 3 M. A. S. (Revised Supplement), Secs. 3022-3135.

By Sec. 2, Art. III, of the National Guard act, being Sec. 3032, M. A. S., you will find that it is provided that "in time of peace the National Guard shall consist of the staff of the commander-in-chief, a quartermaster and commissary general's department, a medical department, one brigade under the command of a brigadier general, and a retired list."

By this section you will see that the General Assembly has required that there shall be a National Guard consisting of a brigade under the command of a brigadier general.

Section 5 of this same article, which states of what the brigade shall consist, was amended by the General Assembly of 1903 and the amendment will be found as section 3035 of the Revised Supplement of M. A. S., and is as follows:

"The brigade shall consist of not more than one signal corps, one squadron of cavalry, one light battery of artillery, and two regiments of infantry, each of which shall be organized in such manner and shall consist of such officers, non-commissioned officers and enlisted men as the Governor of the State, upon the advice and approval of the military board, may from time to time prescribe; provided, that the organization of the said signal corps, squadron of cavalry, light battery of artillery, and two regiments of infantry shall at all times conform, as nearly as the conditions of the service will justify, to the organization of similar bodies in the army of the United States; provided, no part of the National Guard shall be taken outside of the State at any expense to said military fund, or to the State."

You will see from this that the General Assembly has definitely provided that a brigade shall consist of not more than the component parts designated, but that each of such component parts shall be organized in such manner, and shall consist of

such officers, etc., as the Governor, upon the advice and approval of the military board, may from time to time prescribe. This section gives you the authority, upon the advice and approval of the military board, to change the organization of the component parts of a brigade, provided the brigade is not increased beyond the limits prescribed by this section. But I find no warrant or authority in the statutes or Constitution of this State for you, by executive order, to do away with the brigade formation.

I am therefore of the opinion that, in time of peace, the National Guard must have a brigade under the command of a brigadier general.

I see no difficulty in that the law provides for a brigade and also for the staff of the brigadier general, and again that the military board shall be composed of the Governor, Attorney General, brigadier general, etc., as suggested by your letter. The military board has certain duties to perform, prescribed by the National Guard act above cited, such as auditing certain accounts and prescribing such regulations, not inconsistent with the law, as will increase the discipline and efficiency of the National Guard. The staff of the brigadier general provided for by Sec. 3036, M. A. S. (Revised Supplement), has nothing to do with the military board, and that staff is appointed and commissioned by the Governor on the recommendation of the brigadier general, and the brigadier general, by section 3 of article 7 of our Constitution, which provides that "the Governor shall appoint all general, field and staff officers and commission them," is also appointed and commissioned by the Governor, so that no confusion whatever should arise.

While, therefore, I am of the opinion that you can not do away with the brigade formation, yet I am also of the opinion that, under section 3035, M. A. S. (Revised Supplement), there may be changes made in the component parts of the brigade upon the advice and approval of the military board.

Respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

## PAY OF NATIONAL GUARD.

**An officer of the National Guard should be allowed 10 per cent. increase in salary for each five years' service, less 20 per cent.**

Denver, Colo., January 23, 1904.

THE MILITARY BOARD OF THE STATE OF COLORADO,
State Capitol.

Gentlemen—In reply to your request for my opinion as to the claim of Captain H. D. Humphrey for additional pay, I would say that it appears from the statement of Captain Humphrey that he has served over fifteen years as an officer of the United States Army, and that period of service would entitle him, if still in the service of the United States, to a thirty per cent. increase in his pay.

The evident purpose of ten per cent. increase in pay for each five years' of service, is that an officer is more valuable to the service by reason of his increasing experience; and our statute expressly provides that all commissioned officers shall receive the same pay as is paid the United States Army officers of like grade, less twenty per cent.

I am of the opinion that Captain Humphrey's claim for extra pay, by reason of his long service, should be allowed; and the efficiency of the National Guard will be thereby increased, by encouraging the enlistment of men of experience in the regular service who may be honorably discharged from the regular army. I am,

Yours respectfully,

N. C. MILLER,
Attorney General and Ex-Officio Judge Advocate General.

By HENRY J. HERSEY,
Assistant Attorney General.

## PAY OF NATIONAL GUARD.

**Members of the National Guard are entitled to transportation to and from their home stations to the place of service when on duty, but not when on furlough.**

Denver, Colo., January 19, 1904.

TO THE MILITARY BOARD OF THE STATE OF COLORADO,
State Capitol.

Gentlemen—In reply to your request for my opinion as to the claim of C. A. Smith, who, you inform me, is either a private or a non-commissioned officer in Company L, 1st Regiment, N. G. C., for $5.25 for transportation from Cripple Creek to Denver while on a furlough, I would say that I find no provision in the statutes for the paying by the State of transportation while officers or men are on furloughs.

They are undoubtedly entitled to transportation to and from their home stations to the place of service, but if they desire to travel while on furloughs, they must do so at their personal expense. I am,

Yours respectfully,

N. C. MILLER,
Attorney General and Ex-Officio Judge Advocate General.

By HENRY J. HERSEY,
Assistant Attorney General.

## PAY OF OFFICER OF NATIONAL GUARD.

**An officer of the National Guard, ordered on active duty, is entitled to the same pay as given an officer of the United States army of like grade, less 20 per cent.**

Denver, Colo., January 19, 1904.

THE MILITARY BOARD OF THE STATE OF COLORADO,
State Capitol.

Gentlemen—I have your request for my opinion as to the pay to which Lieutenant W. R. Eaton is entitled. Your request

for my opinion was not accompanied by any general or special orders of the Governor or commanding officer of the National Guard, so that I am unadvised as to how Lieutenant Eaton was ordered to report for duty, other than the statement contained in his protest to the board, October 26th, last, in which he states that his commission is that of a first lieutenant, and adjutant of the First Squadron, Cavalry. If he was ordered on duty as first lieutenant and adjutant of the First Squadron, Cavalry, then, under the statutes of this State, section 10, article V, of the National Guard Act, found in Session Laws of 1897, pages 200 and 201, he is entitled to the same pay as is a United States Army officer of like grade, less twenty per cent. the amount, which can be easily figured by the paymaster general of the National Guard.

The above and foregoing opinion is also applicable to the claim for pay as regimental adjutant of H. M. Libby.

Yours respectfully,

N. C. MILLER,
Attorney General and Ex-Officio Judge Advocate General.

By HENRY J. HERSEY,
Assistant Attorney General.

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## PAY OF RETIRED OFFICERS.

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**Retired officers of the National Guard, when ordered into active service, should receive the full pay of their rank.**

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Denver, Colo., January 19, 1904.

THE MILITARY BOARD OF THE STATE OF COLORADO,
State Capitol.

Gentlemen—In reply to your request for my opinion as to the pay of the retired officers of the National Guard, ordered upon duty, I would say that by section 10, of article 5, of the National Guard Act, found in Session Laws of 1897, pages 200-201, the officers and enlisted men, when serving under orders of the Governor to prevent violation of the laws of the State, or to prevent or suppress riot and insurrection, etc., shall receive the same pay as is paid United States Army officers of like grade, less 20 per cent.

It appears from copies of the orders of the Governor and of the commanding general of the National Guard, submitted

to me, that Brigadier General B. F. Klee, retired, Brigadier General J. C. Overmeyer, retired, and Colonel J. E. Johnston, retired, were ordered to report for duty, and it also appears that they did report for duty and serve.

The general order referred to is "General Orders No. 6."

In the case of Brigadier General Overmeyer, he was relieved from duty on October 7th by special orders No. 268. All these orders referred to the parties so ordered to report for duty or relieved from duty, as the case may be, under their respective rank.

The United States statute relating to the pay of retired officers of the United States ordered on duty is to be found in the 30th volume of the United States Statutes at large, at page 978, section 7, and is as follows:

"The President in his discretion may order on active duty such retired officers as he may see fit, other than in the command of troops, and officers so serving shall be entited to the full pay of their rank."

In my judgment, when a retired officer is ordered into active service, he is entitled to receive the same pay while on duty as officers in the United States army of like grade, less twenty per cent., and I am assisted in this opinion by the opinion of General A. E. Bates, Paymaster General of the United States army, furnished me by General Klee in answer to inquiries on the matter made to him by General Klee, in which, after citing the United States statute above referred to, among others, General Bates says:

"Under the above, a general officer, detailed as stated, would receive the active pay of his rank."

I am, therefore, of the opinion that the amount of pay to which the officers above mentioned are entitled for active services is a mathematical question, to be ascertained by the paymaster of the National Guard upon the basis of pay of the United States army officers of like grade.

It has been suggested that, where the officer remains on duty after it is known to him that the paymaster general of the National Guard has made up the pay roll allowing him less pay than that of his rank, it is a waiver of the right to full or statutory pay, and that the amount of pay is merely a matter of contract.

In reply to this, I would say that the first duty of a soldier is to obey orders; he has not, like a private citizen, the right to cease work if dissatisfied with his pay, but must remain on duty until relieved by the orders of his superior; so that the fact of his remaining on duty is, in no sense, a waiver of his right to

statutory pay, and his right to be paid is not a matter of contract, but a matter of statute.

I am,

Yours respectfully,

N. C. MILLER,
Attorney General and Ex-Officio Judge Advocate General.

By HENRY J. HERSEY,
Assistant Attorney General.

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## CLAIM FOR DAMAGES BY SOLDIERS.

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**The State assumes no obligation for loss of clothing of members of the National Guard while in service.**

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Denver, Colo., February 15, 1904.

HON. JAMES H. PEABODY,
Governor of Colorado,
State Capitol.

Dear Sir—I return herewith the claims of members of company G, Pueblo, Colorado, for balance of pay due them, and, also, for clothing alleged to have been lost.

If there is a balance of pay due them, it should be paid in due course of business. As to the loss of clothing, the State assumes no obligation as to such loss by members of the National Guard while in its service. It could be paid, if at all, only by an act of the Legislature.

Respectfully,

N. C. MILLER,
Attorney General.

## SAFETY APPLIANCES IN MINES.

**The law establishing the bureau of mines, and the law regulating the construction, etc., of metalliferous mines, mills and metallurgical plants, are each constitutional, and amply sufficient to compel a compliance therewith by the managers thereof.**

Denver, Colo., February 8, 1904.

HON. JAMES H. PEABODY,
Governor of Colorado,
State Capitol.

Dear Sir—In reply to your inquiry as to whether the following improvements can be required and the changes enforced in the construction, equipment and operation of metalliferous mines in this State, to wit:

1. The use of some suitable overwinding device.

2. The use of a set of chairs, placed in the gallows frame at a point that will insure the catching of the cage, if the cable is parted from the cage.

3. The testing of the safety clutches used on cages by some competent person at regular intervals;

as recommended by the committee appointed by the Commissioner of Mines to investigate the recent Independence Mine disaster in Teller county, I desire to say that, in my opinion, these are all reasonable demands, and can be fully enforced under our present law.

A portion of the present law was passed by the Tenth General Assembly, Session Laws 1895, page 206, and entitled "An act to create a Bureau of Mines, to define the duties of the Commissioner of Mines and provide for the government thereof, and making an appropriation therefor; and to repeal an act entitled 'An Act dividing the State of Colorado into metalliferous mining districts; and appointing an inspector of metalliferous mines, approved April 1, 1889, and portions of other acts in conflict herewith.'"

This law was amended by the Twelfth General Assembly, Session Laws, 1899, page 277, but few important changes were made, excepting the insertion of a new section, numbered 20.

The body of the act, as amended, after making provision for the location of the principal office, the appointment of a commissioner and two inspectors, further provides as follows:

"Sec. 4. It shall be the duty of the inspectors to examine and report to the Commissioner the condition of the hoisting

machinery, engines, boilers, whims, cages, cars, buckets, ropes and cables in use in all the metalliferous mines in operation in the state, the appliances used for the extinguishment of fires, the manner and methods of working and timbering the shafts, drifts, inclines, stopes, winzes, tunnels and upraises through which persons pass while engaged in their daily labors, all exits from the mine, and how the mine is ventilated, together with the sanitary condition of the same, and, also, how and where all explosives and inflammable oils and supplies are stored, also the system of signals used in the mine. He shall not give notice to any owner, agent, manager or lessee of the time when such inspection shall be made."

"Sec. 5. The Commissioner of Mines may, as appropriations may be made therefor, from time to time, appoint deputy inspectors in the various mining camps or districts to investigate or report on accidents, or appoint such other competent assistants as he may deem necessary and proper for the carrying out of the object of this act; * * *"

"Sec. 8. * * * The Commissioner shall, on receipt of reliable information relating to the health and safety of the working men employed in any metalliferous mine, mill or reduction plant in the state, or whenever he deems such inspection necessary, examine or instruct one of the inspectors to examine and report to him the condition of the same. The owner, agent, manager or lessee shall have the right to appeal to the commissioner on any difference that may arise between such parties and the inspector. On receipt of notice of any accident in a mine, mill or reduction plant, whether fatal or not, the commissioner shall inquire into the cause of such accident."

"Sec. 10. Every owner, agent, manager or lessee of any metalliferous mine or metallurgical plant in this state shall admit the Commissioner or inspector on the exhibition of his certificate of appointment, for the purpose of making examination and inspection provided for in this act, whenever the mine is in active operation and render any necessary assistance for such inspection. But said Commissioner or inspector shall not unnecessarily obstruct the working of said mine or plant. The refusal of the owner, agent, manager or lessee to admit the commissioner or inspector to such mine or plant to lawfully inspect the same shall, upon conviction, be deemed a misdemeanor, and shall be subject to a fine of not less than fifty dollars ($50.00), nor more than three hundred dollars ($300.00), or be imprisoned not less than one (1), nor more than three (3) months, or both such fine and imprisonment."

"Sec. 11. The Commissioner and the inspectors shall exercise a sound discretion in the enforcement of this act, and if they shall find any matter, thing, or practice, in or connected with any metalliferous mine or metallurgical plant to be dangerous or defective, so as to, in their opinion, threaten or tend to the

bodily injury of any person, the Commissioner or inspector shall give notice in writing thereof to the owner, agent, manager or lessee, of such mine or plant, stating in such notice the particulars in which he considers such mine or plant, part thereof or practice to be dangerous or defective; and he shall order the same to be remedied; a copy of said order shall be filed and become a part of the records of the Bureau of Mines, and said owner, agent, manager, or lessee shall, upon compliance of said order immediately notify the Commissioner of Mines in writing. Upon the refusal or failure of said owner, manager, agent or lessee to report within a reasonable length of time, said owner, agent, manager or lessee shall be subject to a fine of not less than fifty dollars ($50.00) nor more than three hundred dollars ($300.00) for each and every such refusal or failure."

"Sec. 13. In case the owner, agent, manager or lessee, after written notice being duly given, does not conform to the provisions of this act, or disregards the requirements of this act, or any of its provisions, or lawful order of the Commissioner or inspector made hereunder, any court of competent jurisdiction may, on application or information of the Commissioner of Mines, by civil action in the name of the people of the State of Colorado, enjoin or restrain the owner, agent, manager or lessee from working the same until it is made to conform to the provisions of this act; and the costs of action paid by defendant, and such remedy shall be cumulative, and shall not effect (affect) any other proceedings against such owner, agent, manager or lessee, authorized by law for the matters complained of in such action."

"Sec. 22. All justices of the peace and county courts in their respective counties shall have original jurisdiction in prosecution for the violation of sections nine (9), ten (10), thirteen (13), nineteen (19) and twenty (20) of this act, with the right to appeal from judgment of justices of the peace to County Courts in their respective counties, under the same conditions as in civil cases; and in all trials before justices of the peace and in County Courts the defendant shall be entitled to a trial by jury as in other misdemeanor cases. District Courts in their respective districts shall have original jurisdiction upon information or indictment in all prosecutions for violations of this act."

As all the above provisions are germane to the subject-matter as expressed in the title, and as the title contains but one general subject, to-wit, the creation of a Bureau of Mines, no question as to the constitutionality of the act in this respect appears at this point.

However, the latter paragraph of section 19, reads:

"For the purpose of providing the necessary rules and regulations for the government of metalliferous mining in this State,

the following section, to be known as section 20, is hereby enacted and made a part of this act;"
and then follows section 20, attempting to regulate the construction, equipment and operation of metalliferous mines by the managements thereof, which apparently is in violation of article V, section 21 of our State Constitution, which provides that "no bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in the title," and for this reason, this portion of the act, doubtless, is unconstitutional; but in accordance with the further provision of article V, section 21, "if any subject shall be embodied in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed," the balance of the act is not affected thereby, and is in force and effect at this time.

The Fourteenth General Assembly, Session Laws, 1903, page 360, passed an act entitled

"An act to regulate the construction, equipment and operation of metalliferous mines, mills and metallurgical plants, providing penalties for violations thereof, and repealing all acts or parts of acts in conflict herewith,"

which embodies practically all the provisions of section 20 sought to be incorporated into the law of 1899, supra.

The act of 1903 regulates, with regard to safety, the manner of constructing tunnels, shafts and inclines; the storage of explosives, and the manner of charging holes therewith; the number of men riding, at one time, upon any cage, skip or bucket; and prohibits the employment of any person under 18 years of age or addicted to the use of intoxicating liquor as hoisting engineer; and provides that all hoisting machinery shall be equipped with an indicator placed in plain view of the engineer; that a uniform system of code signals shall be used; that all mines having but one exit and that enclosed by the mechanical plant, shall have ample fire protection, and in addition shall have a separate emergency exit, located at a safe distance from the main entrance, equipped with ladders, where necessary, always to be kept in good repair; that in all shafts having cages, safety clutches shall be used; and that whenever loss of life or other serious accidents occur, the Commissioner shall immediately investigate the same, and make a report thereof, to be filed in his office for future reference.

Sections 25, 26 and 27 further provide:

"Sec. 25. The Commissioner of Mines of the State of Colorado, inspectors, or either thereof, shall have power to make such examination or inquiry as is deemed necessary to ascertain whether the provisions of this act are complied with; to examine into and make inquiry respecting the condition of any mine, mill or metallurgical plant, or part thereof, and all matters or things connected with or relating to the safety of the

persons employed in or about the same; to examine into and make inquiry respecting the condition of the machinery or mechanical device, and, if deemed necessary, have same tested; to appear at all coroners' inquests held, respecting accidents, and if deemed necessary, call, examine, and cross-examine witnesses; to exercise such other powers as are necessary for carrying this act into effect."

"Sec. 26. Any owner, agent, manager or lessee, whether individual, partnership or corporation, operating a metalliferous mine, mill or metallurgical plant in this State, who fails to comply with the provisions herein set forth, or either or any thereof, shall be deemed guilty of a misdemeanor, and when not otherwise provided, shall be liable to a fine of not less than twenty-five dollars ($25.00) nor more than three hundred dollars ($300.00) for each provision not complied with, and each day after conviction of failure to comply with any provision hereof, shall be deemed a separate offense and punished accordingly.

"The district attorney for the district in which such mine, mill or metallurgical plant is situated, is hereby empowered and directed to bring an action in the name of the people of the State of Colorado against such owner, agent, manager or lessee, whether individual, partnership or corporation, operating such metalliferous mine, mill or metallurgical plant when he is not complying with the provisions of this act, or any part thereof, or for the violation of any rule made in conformity with this act by the Commissioner of Mines of the State of Colorado. Such penalty when recovered shall be turned over by such district attorney to the Treasurer of the State of Colorado for the benefit of the general school fund of the State of Colorado."

"Sec. 27. Justices of the peace in their respective counties, shall have jurisdiction in prosecutions for the violation of this act, subject to the right of appeal as now provided for in cases of assault and battery."

While the act of 1903 specifically enumerates certain things that shall be done, and certain things that shall not be done in the construction, equipment and operation of metalliferous mines and mills, looking to the safety of employes, it does not prohibit the Commissioner or inspector, either in accordance with its provisions or the provisions of the act of 1899, from recommending, and after proper notice, from enforcing such reasonable changes as are necessary for the further protection of human life.

It would be as absurd to say that because the act of 1903 does not specify the strength of the cable or the size of the timbers to be used in a mine, that a cord could be used for the former and a quarter-inch siding for the latter, as it would be to affirm that so long as a cage is equipped with safety clutches, it is immaterial whether or not the clutches work, so long as the letter of the law is complied with. And more absurd would it

be at this time—after it has been demonstrated by the loss of fifteen human lives, that safety clutches, in the best of conditions, do not always work—to say that the owners and operators of mines in this State can not be compelled to place chairs in the gallows frames at some suitable point to insure the catching of a descending cage, or at least to adopt other appliances equally effective.

The act of 1899, excepting section 20, and the act of 1903, supra, constitute our present law upon this subject. The power of the Legislature to pass each is beyond legitimate controversy, and each, with the exception of section 20, appears to have been passed in accordance with all constitutional requirements.

I believe the law to be amply sufficient to enforce, not only the requirements recommended by this committee, but all other reasonable requests that may be necessary for the further preservation of human life, and that the Commissioner of Mines and the inspectors are given ample power through the courts, to enforce both the letter and the spirit of the law.

Respectfully submitted,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

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## TERM OF OFFICE OF COMMISSIONER OF MINES.

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**The term of officer of Commissioner of Mines is fixed by the Constitution at four years. The term begins at the date of appointment and ends four years thereafter, but may extend beyond until his successor is appointed and qualified. However, when he is his own successor, the first term can not be extended by his holding over, but the two terms will be construed together. That is, the second term will begin four years after the first appointment.**

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Denver, Colo., March 24, 1903.

HON. JAMES H. PEABODY,
Governor of Colorado,
State Capitol.

Dear Sir—I am asked for an opinion as to when the term of office of Hon. Harry A. Lee, as Commissioner of Mines, terminates.

The act creating the office of Bureau of Mines of the State of Colorado was approved March 30, 1895. This act was in compliance with article 16, section 1, of the State Constitution.

Mr. Lee's appointment for the first term was made May 10, 1895, for a term of four years. He took formal possession of the office on May 20, 1895. His appointment was confirmed by the Legislature in 1897. On April 2, 1899, he was reappointed by Governor Thomas, and approved by the Senate the same day.

The constitutional provision relating to the Commissioner of Mines is as follows:

"There shall be established and maintained the office of Commissioner of Mines, the duties and salaries of which shall be prescribed by law. When this office shall be established the Governor shall, with the advice and consent of the Senate, appoint thereto a person known to be competent, whose term of office shall be four years."

Section 1, article 16, Constitution.

Section 1582, M. A. S., provides:

"That the term of such officers appointed by the Governor, except those whose terms of office are otherwise fixed by law, shall commence on the first Wednesday of April next after their appointment, and shall continue for a term of two years," etc.

I only cite this statute to call attention to it, but hold that it has no application to the Commissioner of Mines.

The Consitution fixes the term of this office at four years, and it begins on the date of his appointment, and ends four years thereafter, and may extend beyond until his successor is appointed and qualified. When he is his own successor, the term can not be extended by his holding over until the appointment is made of himself later, but the two terms will be construed together, and the end of the second term will be exactly eight years from the date of the first appointment.

"Statutes creating public offices usually prescribe the limits of the terms provided for, fixing the dates at which they shall begin and end. The date of the commencement of the term is ordinarily fixed for some appreciable period after the election or appointment, in order to give the newly chosen officer time to arrange his affairs and to qualify in the prescribed manner.

"Where, however, no time is fixed, the term will begin on the date of the election, in case of elective officers, and at the date of the appointment where the officer is appointed.

"Where the term runs 'from' a certain date, the day of the date is excluded in the computation.

"Where the term of the officer is fixed by the Constitution, the Legislature can neither extend nor abridge it.

"So, where the Constitution directs that certain officers shall be elected by the people, and authorizes the Legislature to fix the term and prescribe the time and place of the election, and the length of the term has been fixed and the officer elected, an act of the Legislature extending the term of the present incumbent is unconditional and void.

"So, where the Constitution provides that an officer shall hold at the pleasure of the appointing power, a statute prescribing that he shall hold for a fixed time is invalid.

"But a constitutional provision that the term of no officer shall be extended to a longer period than that for which such officer was elected or appointed, was held not to be intended to, and did not prevent the Legislature from making reasonable changes in the times for electing public officers, and the fact that a statute for that purpose had the effect incidentally to extend the time of the present incumbent, did not render it unconstitutional.

Sections 386 and 387, Mechem on Public Officers.

Respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

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## STATE OFFICER.

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**The office of examiner of titles and legal adviser of registrar is not a State office, therefore can be filled by a State Senator.**

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Denver, Colo., July 25, 1903.

HON. EDWARD T. TAYLOR,
Senator 21st District, Colorado,
Senate Chamber.

Dear Sir—I am in receipt of your request for an opinion concerning the validity of the appointment of a State Senator to the position of examiner of titles and legal adviser of the registrar under the act of the General Assembly of 1903, concerning land titles, such Senator being a member of the Legislature which passed the act in question.

Section 8, article V of the Constitution, reads as follows:

"No Senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under this State; and no member of Congress, or other person holding any office (except of attorney at law, notary public or in the militia), under the United States or this State, shall be a member of either House during his continuance in office."

This act has been construed in numerous states and by our own court and by this office, and its meaning has been plainly set forth by these various opinions.

The constitutional prohibition relates to the appointment "to any civil office under the State." The latter part of the section does not concern the inquiry.

It will be observed that the first question to be disposed of is the nature of the position of "examiner of titles and legal adviser of the registrar."

An examination of the entire act has been made in order to determine if any duty imposed upon such officer relates in any manner to the administration of the affairs of the State.

I do not find that the officer is required to perform any duty pertaining to the State. He is merely an agent of the local court for carrying into effect private rights under the statute, which duty in no respect involves State affiairs. The constitutional prohibition relating solely to a civil office under the State, I hold does not apply.

"The office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emoluments and duties."

U. S. vs. Hartwell, 6 Wall., 393.
In re H. B. No. 166, 9 Colo., 628.

The position is an official one, but, like many other offices created by law, it is not an office within the meaning of the constitutional provision, and can not possibly interfere with any duty you have to perform as a member of the Senate.

"It is my opinion, therefore, that a membership on the Board of Trustees of the State Normal School is a civil office under this State, and that no Senator or representative is eligible to be appointed to such office during the time for which he shall have been elected as such Senator or representative."

Rep. of Attorney General Campbell, 1899-1900, page 50.

I think the conclusion of that opinion is sound. The Normal School is a State institution, controlled, governed and supported by the State; the Legislature has much to do with that institution, and it is inconsistent with the duties of Senator that he should be a trustee of the State Normal School.

I regard the examiner as a mere agent to assist the court in putting into operation an act pertaining exclusively to private rights, and in no sense involving the performance of public duties.

Respectfully submitted,

N. C. MILLER,
Attorney General.

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## STATE OFFICER.

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**The deputy clerk of the Supreme Court is not a State officer, therefore his salary can be increased during his term of office.**

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Denver, Colo., July 14, 1903.

HON. JOHN A. HOLMBERG,
Auditor of State,
Capitol.

Dear Sir—In regard to the question as to whether the increase of salary of the deputy clerk of the Supreme Court, by H. B. No. 358, approved April 10, 1903, and being found in the Session Laws of 1903 at pages 195-199, as applied to the present incumbent, is in violation of section 30, article V of the State Constitution, which provides that "except as otherwise provided in this Constitution, no law shall extend the term of any public officer or increase or diminish his salary or emoluments after his election or appointment," I would say that the decision is dependent upon the interpretation of the words "public officer," and so as to whether or not the deputy clerk of the Supreme Court is a public officer within the meaning of that section of the Constitution.

Our Supreme Court has held that the clerk of the Supreme Court is not a State officer, and that the clerk derives his office by appointment from the judges, and holds the same during the pleasure of the judges, and may be removed by them.

In re Speakership, 15 Colo., 532.

Our Supreme Court has also held that the office of deputy clerk of a county court is not an office within the meaning of that other section of the Constitution which provides that "no person except a qualified elector shall be elected or appointed to any civil or military office in this State."

Section 6, article VII, Colorado Constitution.

In this case the Supreme Court held that a woman, before the days of woman's suffrage, though not a qualified elector, could hold the office of deputy county clerk.

In other jurisdictions, where the question of whether an increase or diminution in the salary of certain officers was in violation of like provisions of the constitutions of other states, it has been held that such provisions embraced only officers which are elected or appointed for some specific or definite term, and does not apply to officers who do not have a fixed term of office.

State vs. Cheetham, 21 Wash., 440.
State vs. Johnson, 123 Mo., 43.

As, therefore, the deputy clerk of the Supreme Court is appointed by the clerk and holds his position for no fixed term, and only at the pleasure of the clerk, and as our Supreme Court has held that the clerk is not a State officer, I am of the opinion that the increase in the salary by the act above referred to of the present incumbent is not in violation of the Constitution. He is, therefore, entitled to draw the same from the time the act goes into effect.

Very respectfully,

N. C. MILLER,
Attorney General.

By H. J. HERSEY,
Assistant.

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## LEGISLATURE CAN NOT EXTEND OFFICIAL TERM.

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**The act of 1903, relating to the World's Fair Board, extends the term of existence of the board, but not of the individual members, and the term of the old members will expire on December 30, 1903, and the two new members should be reappointed.**

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Denver, Colo., December 22, 1903.

HON. JAMES H. PEABODY,
Governor of Colorado,
State Capitol.

Dear Sir—In response to your request for my opinion as to the term of office of the present members of the Board of St. Louis World's Fair Managers of Colorado, I have to advise you as follows:

By section 2 of the original act creating this board, the term of office of the first members of the board was limited to "until December 31, 1903." Session Laws 1901, page 357, section 2.

The Fourteenth General Assembly amended the act in certain particulars, providing for an increase in the number of members of the board, and authorizing the Governor to appoint two additional members, thereby increasing the total number to seven, inclusive of the Governor, who is ex-officio a member of said board.

By such amendments it was also provided that "all the members of such board shall hold their office until January 15, 1905." Session Laws 1903, page 85, section 5.

It has been suggested that this last amendment extended the term of office of the present members until January 15, 1905, but in my opinion this is not correct, but that all that this amendment did was to extend the term of existence of the board as a board and not the term of office of the individual members of the board to January 15, 1905.

If this were not so, the amendment of 1903 would be unconstitutional, in that it would be in violation of section 30, article V of our Constitution, which provides that "no law shall extend the term of any public officer or increase or diminish his salary or emoluments after his election or appointment."

As the members of this board hold their positions by appointment, not by contract, and have duties which are defined by statute, and which relate to the administration of the affairs of the State, they are public officers within the meaning of this section of the Constitution.

Parks vs. Soldiers' & Sailors' Home, 22 Colo., 96.
23 Am. & Eng. Enc. Law (2nd Ed.), 322-323.

In the case decided by the Supreme Court of Washington, under a similar constitutional provision, it was said that:

"It is clear under the section of the Constitution above referred to that the Legislature has authority to fix the term of such office. It is also clear that when the Legislature has once fixed the term of an office, a subsequent act of the Legislature can not extend such term so that one in office may hold such office for a longer term than he was elected."

State vs. Tallman, 24 Wash., 426, 429.

See, also,

People vs. Bull, 46 N. Y., 57.

See, further, cases cited in 23 Am. & Eng. Enc. Law (2nd Ed.), p. 407, note (7).

Moreover, if it should be contended that by reason of the amendment of 1903 the statute fixing or limiting the duration of

the term is ambiguous, it is a rule of construction that that interpretation should be followed which limits the term to the shortest time.

23 Am. & Eng. Enc. Law (2nd Ed.), p. 409, par. (2).

The duration of the term in the original act being "until December 31, 1903," the term will close on December 30th, and the new board should be appointed by you to take office on December 31, 1903. 26 Am. & Eng. Enc. Law, 9.

I am in doubt about the expiration of the term of the two additional members, and for safety I would advise that you reappoint them, but I have no doubt as to the expiration of the term of the old members on December 30, 1903.

Yours respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

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## PUBLIC PRINTING.

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**No public printing or binding can be furnished any department of the State, or officer or employe thereof, except on requisition upon the Commissioner of Public Printing. The printing of blank forms of registers, books, etc., furnished to each county, is not under the control of the State Auditing Board. All other printing, such as State diplomas, school laws, etc., must be paid from the general appropriation.**

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Denver, Colo., June 9th, 1903.

HON. HELEN L. GRENFELL,
State Superintendent Public Instruction,
Capitol.

Dear Madam—Replying to yours of the first inst., enclosing copy of your letter of April 24th, I would say that under the new public printing act, estabishing the office of Commissioner of Public Printing, aproved April 11th, 1903, no public printing or binding of any sort shall be furnished to any department of the State government, or to any officer or employe of the State, except on the requisition of the head of such department, addressed to the Commissioner of Public Printing. In effect, the Commissioner of Public Printing now performs the duties pre-

viously devolving upon the Secretary of State and Printing Clerk.

I am of the opinion that the blank forms of registers, books, etc., required to be furnished by you under section 973, M. A. S., the cost of which is to be deducted from the amount apportioned to each county at the semi-annual apportionment of school funds, and paid by the counties respectively for whom the printing is ordered, out of that fund, is not under the control of the State Auditing Board, provided for by the General Appropriation Act; and the amount apportioned to your department by the State Auditing Board is not applicable to that expense. The expense of such printing and binding is not an expense of the State, but an expense charged to, and paid for, by the particular county to which it is furnished, and the money is simply advanced by the State Treasurer out of the State school fund upon your certificate, as provided for in said section of the statutes.

All other printing of your department, however, such as your state diplomas, school laws, etc., must be taken from the contingent fund allowed your department under the General Appropriation Act. It is probably needless for me to say, however, that, until the Supreme Court has passed upon the suit involving the validity of the last General Appropriation Act, there is no money available under that act.

Trusting that this will be a satisfactory reply to your inquiry, I am,

Respectfully,

N. C. MILLER,
Attorney General.

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## PUBLIC PRINTING.

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**Powers and Duties of Commissioner of Public Printing—Requisition from heads of departments necessary. Requisition must be approved by Auditing Board. Control of contingent fund under general appropriation act. Bills audited; how. All printing by contract; exception.**

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Denver, Colo., July 27, 1903.

W. A. PLATT, ESQ.,
Commissioner of Public Printing,
State Capitol.

Dear Sir—Replying seriatim to your several questions as to the proper interpretation of certain provisions of the new Public Printing Act, approved April 11, 1903, I would say:

1. The act, having the emergency clause attached to it, went into effect immediately upon its approval by the Governor, namely, April 11th, last, except that it does not affect any express provision of the existing contract made under the former act, but as to any printing expressly provided for by such contract, the new act controls.

2. Section 8 went into effect immediately upon the approval of the act. The word "pamphlets" in this section of the act covers pamphlets issued by all officers or departments, as no exceptions are made.

3. Section 10 does not annul or modify any existing contract in any matter expressly provided for therein.

4. Section 18 would probably be held to be directory, and not mandatory to the extent that other kinds of paper than those specified might be used if they did not cost more than the kinds allowed by this section. The words "without additional charge to the State," as used in this section, mean, in my judgment, that the prices fixed by contract, which must not exceed the maximum prices set out in section 10, include the paper furnished.

5. Section 21 reads as follows:

"No public printing or binding of any sort or description whatever, shall be furnished to any department of the State government, or to any officer or employe of the State, except on requisition of the head of such department, addressed to the Commissioner of Public Printing."

You inquire whether this section covers the matter of requisitions, and if they are sent to the Commissioner, can he send the order to the State printer without first referring them to the Auditing Board. My opinion is that this section can not be construed by itself.

Section 24 provides:

"No expenditure, during any period, shall be made under this act, exceeding in the aggregate the amount of the appropriation of the General Assembly for printing and binding for the period of such expenditure."

Section 20 requires all bills to be made out in duplicate and filed in the office of the Commissioner of Public Printing, to be carefully examined by him and compared with the prices stipulated in the contract, and says that he shall certify to the State Auditor the amount found to be due thereon. The State Auditor shall thereupon examine and audit the same, and issue his warrant on the State Treasurer for the amount due.

These several sections must be construed together, and with any other statutes covering the same subject which are not repealed by this act.

The Constitution provides that the expenditures shall in no manner exceed the appropriation, and that no debt can be created for which an appropriation has not been made.

The only funds out of which the bills for printing can be paid are those contained in the general appropriation bill. If the provisions of this bill prevent the Commissioner of Public Printing from contracting any liability against it, without first having a requisition which has been approved by the Auditing Board, then it is evident that he can not act upon the requisitions addressed to him without first referring them to the Auditing Board.

The purpose, evidently, was to have a Commissioner of Public Printing who was technically qualified to pass upon printing, and it is proper that the requisitions should be sent to him to be filled according to contract.

As to all questions involving printing, quality of paper, style of work and prices, the jurisdiction is in the Commissioner of Public Printing. The act, in several places, specially enjoins upon that officer an inquiry concerning all such matters. He is expressly cautioned to make a comparison of the prices charged with those contained in the contract. He is required to keep on hand samples of paper and styles of printing, and the act points out the size and the quality of paper, and size of type to be used, and various other particulars, and places the duty of seeing that a compliance with the act in these particulars is made by the persons holding the contract.

All these matters are, therefore, clearly within the duty of the Commissioner of Public Printing, and it is probably desirable to emphasize the point that the prices to be rendered for the printing are within the supervision of the Commissioner of Public Printing.

You will observe that he is required to give a heavy bond for the faithful performance of his duties, and, therefore, I am desirous of being especially clear upon this subject.

The only question which is in the control of the Auditing Board is the right to contract the bill at all, not as to whether the bill, in its form, can be entertained by you, or as to whether the prices are correct.

The theory of the general appropriation bill is that the contingent fund is placed in the hands of the Auditing Board, and it provides that no debt can be contracted against it unless first approved by that Board, and this restriction applies to you as Commissioner of Public Printing as well as to the heads of departments which make the requisitions upon you for printing. The necessity of such an arrangement is obvious, for if several persons were allowed to control the expenditure of the contingent fund, there could be no system or harmony in its disbursement. It is necessary that the Auditing Board maintain exclusive control of this fund to see that no one department is

using a larger amount of that fund than rightfully belongs to it, as compared with the needs of other departments.

This Board can also investigate and inquire into the needs of the various departments, officers and bureaus, and after making such an investigation, can determine what moneys can be allowed to be expended for the contingent expenses of the respective officers and departments. This control can not be divided and work out any systematic plan.

I am, therefore, of the opinion that the requisitions must first receive the approval of the Auditing Board before you can contract any liabilities against the contingent fund.

6. Section 24 relates to any and all appropriations made for printing and binding by the General Assembly, whether in the so-called short, or long, appropriation, or in special appropriation acts.

7. The supervision provided for in section 27 refers to such supervision as, in your judgment, is required, and makes you the only person by whom orders shall be given to the contractor.

8. The provisions of section 36 apply now, unless there is a contrary provision in the existing contract.

9. Whether the expression "shall see that the printing and binding of the laws are well executed," in section 37, requires the reading of proof, or not, is a question which must be left to you. My opinion is that it does.

There are many things which are not expressly provided for in statutes governing the duties of officers of the State, and which are necessarily left to the good sense of the State officers and to their laudable desire to do their full duty.

10. I do not think it will be practical to put into operation section 40 during this biennial period. The desire and willingness of newspapers to circulate supplements containing the Session Laws, may be indicated in any way you require; a formal written request would be entirely sufficient, as you could preserve that in your files as a justification for your action.

My opinion is, that after the Legislature adjourns, 50,000 copies of the laws should be printed in sheet form by you, as rapidly as possible, and, in order to accomplish this, you should obtain from the Legislature, or Secretary of State, as fast as the laws are enacted, copies of them, so that you may have 50,000 copies printed as supplements for newspapers, to be distributed immediately upon the adjournment of the Legislature. This is done in many other states, and there is no reason why a live, up-to-date man can not do it in Colorado.

You should obtain a contract for this kind of work at the ime that the contracts are let. It belongs to class seven, which, by section 6 of the act, is required to be covered by a special

contract, and when a proper time arrives, the contract should be made and the work contracted to be done as cheaply as possible.

No contract for public printing or binding should be let without a previous contract, unless it comes within the exceptions mentioned in 3 M. A. S., section 3664a, before new contracts are let under the new statute.

11. Section 20 of the new act requires all bills to be audited by you, and certified to the Auditor as correct, when he is authorized to draw his warrant.

The only caution necessary to be observed is to see that the approval of these requisitions is first obtained from the Auditing Board.

12. As to whether the clause "all other necessary printing," in the present contract with The Smith-Brooks Printing Company, requires all State printing to go to that contract, even although not specially mentioned in the contract, I would say that it does not. Such is not the meaning of that clause.

Section 3663, volume 3, M. A. S., provides that the Secretary of State shall let a contract for printing, covering bills, memorials, resolutions, roll calls, calendars and numerous other articles specially mentioned, and concludes by covering the unmentioned articles by the phrase "all other necessary printing."

It is the duty of the Secretary of State to inquire into the necesary items of printing and make a contract which shall cover everything which he can find out is required by the legislative, executive and judicial departments, and mention them specifically in his contract. The Legislature only undertook to enumerate them as far as it could safely go, and authorized him to proceed further by this phrase. Now, then, so far as the contract does not enumerate them, such a clause in the contract will not extend the operation of it.

The purpose of the law is to require the contract prices for each article or thing, and not to leave it an open question as to what is to be charged. If all printing shall go to the contractor under such "catch" phrase, then, you would have the condition of the State being bound to have nearly all its printing done without any stipulated price agreed upon. This is clearly not the meaning of the act, nor the purpose of the Legislature.

"Section 3664 a" provides that for all work not specified in section 1 of this act, the Secretary of State and the State Measurer of Printing may have the same done wherever it can be obtained to the best advantage of the State. This strengthens our construction of this act. It clearly means that if some incidental printing should arise, not covered by the contract, that the Secretary of State and the State Measurer of Printing shall obtain it where it can be done most advantageously.

On the other hand, if all necessary printing can be included in the contract, without naming it, then the language of the concluding part of "Section 3664 a" would be meaningless.

The act under which you are appointed repeals all other acts and parts of acts in conflict. So far, then, as section 3663 and section 3664 leave the printing and binding to special contract, it is to be obtained by you, and not by the Secretary of State. The statutes are modified to that extent, but the existing contract is not changed.

I believe this covers all the inquiries made by your office, but an examination of the act has persuaded me to go further and clear up certain questions which are likely to arise.

Your attention is called to section 22, which provides that at least fifteen days prior to the advertisement for bids, the head of each executive department of the State shall furnish to such Commissioner a detailed estimate of all things that may be required by such departments under such proposed contract during the then next ensuing period for the contract.

It will be necessary for you to remind the heads of departments of this section, and obtain from them such detailed statement. The purpose of such provision in the law is to enable you to fully cover in detail in your contract the prices, grade and quality of the work, and style of printing to meet every requirement. It frequently arises that some persons imagine they would like to have a certain style of work done, not provided for in the contract, and insist upon your doing it. This the new printing act expressly prohibits. The work which you order must be covered by the contract, and you can only go outside of the contract when you are sure and certain that the material selected and the work done was as cheap, if not cheaper, than the things mentioned in the contract for which it is substituted. You act at your peril in so doing.

Section 34 provides that all stationery and blanks shall be printed on one of the styles and sizes of paper in the manner specified in the contract for printing and furnishing such stationery and blanks, and the Commissioner of Public Printing shall not approve any account, nor shall any money be paid from the State Treasury for any work done or material furnished that is not in accordance with the requirements of such contract, or for which a higher price is paid than that specified in the contract for such stationery and blanks.

This section is of great significance and of primary importance to yourself. It is prohibitory in its language, and, therefore, it is mandatory in its nature, and you must conform strictly to it, or else you would become liable on your bond for money expended contrary to its terms. This statute makes it imperative that you shall order nothing outside of the contract.

Now, this regulates you in the performance of your duties, and you already have a contract covering the printing which is supposed to cover everything which is needed for the public use, and this section applies to the contract now existing between the State and The Smith-Brooks Printing Company, as much as

to any contract let later. It does not change that contract in any way, nor modify, vary, or enlarge it, and violates no principle of law, but is strictly an injunction upon you in the performance of your duties as Commissioner of Public Printing, and requires you to keep within the terms of the existing contract in letting orders.

A particular portion of the act requires you to look after the prices and measurements of printing. You are to keep on hand samples of everything in the contract, and you will therefore supply your office with such things as rapidly as possible, so that persons who desire to order something will have the data from which to make selections.

I have endeavored to cover this new act as fully as possible. It was designed to remedy abuses and evils. It has undertaken to point out very carefully and minutely what your duties are and has exacted from you a large bond, and has made it indispensable for you to fully inquire into your duties and familiarize yourself with the work, so that you may not, by any oversight, neglect them.

Respectfully,

N. C. MILLER,
Attorney General.

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## PRINTING.

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**The contract in existence at the time of placing orders for printing and supplies governs.**

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Denver, Colo., February 21, 1903.

HON. JAMES COWIE,
Secretary of State,
Denver, Colorado.

Dear Sir—In reply to your inquiry of February 18, 1903, as to whether the contract with Smith-Brooks, expiring December 1, 1904, controls orders given it during the month of November, I will say that the contract in existence at the time of placing the order governs. There are no words of exception or qualification, for all printing delivered by the State is to be done during the period of this contract, No. 1.

Yours truly,

N. C. MILLER,
Attorney General.

## PAROLE CONVICT.

**A parole convict remains in the legal custody of the commissioners of the Penitentiary until the expiration of his maximum sentence, less time credited for good behavior. He must first finish this term before beginning another, unless pardoned or tried and sentenced to death for another crime. The fact of his being in legal custody under first sentence, will not prevent his conviction for another crime committed during this time, his sentence to begin upon the termination of the original.**

Denver, Colo., March 25, 1904.

HON. JOHN CLEGHORN,
Warden State Penitentiary,
Canon City, Colorado.

Dear Sir—I am in receipt of your written communication of March 22d, 1904, asking for an opinion from this office in regard to the following matter:

"A convict having served his minimum sentence is released on parole, having a portion of his entire sentence (that is to say, the portion between the minimum and the maximum periods) yet to serve, is arrested, tried and convicted for a crime committed while on parole. He is sentenced accordingly, without any regard to his former service in the prison. Now, should he be compelled to serve out the balance of his unexpired term before he commences on his new sentence? In other words, should his new sentence commence to run when he has completed in every respect the sentence originally imposed upon him?"

Chapter 104 of the Session Laws of 1899, commonly known as the "Indeterminate Sentence Act," provides for the paroling by the Governor of convicts who are serving a term in the Penitentiary under the maximum and minimum sentence under certain conditions and in accordance with such rules and regulations as he may provide. Section 4 of said act provides that:

"Every such convict, while on parole, shall remain in the legal custody and under the control of the commissioners of the Penitentiary, and shall at all times be subject to such rules and regulations as they may prescribe, and shall be subject at any time to be taken back within the enclosure of the Penitentiary from which he was permitted to go at large for any reason which may be satisfactory to the commissioners, and at their sole discretion; and, upon the request of the commissioners, the Governor may order said paroled convict to be returned to the Penitentiary." * * *

Section 5 reads as follows:

"The paroled convict who may, upon the order of the Governor, be returned to the Penitentiary, shall be retained therein according to the terms of his original sentence, and in computing the period of his confinement the time between his release upon said permit and his return to said Penitentiary shall not be taken to be any part of the term of the sentence."

Section 6 reads:

"This act shall not be construed in any sense to operate as a discharge of any convict paroled under its provisions, but simply a permit to any such convict to go without the enclosure of the Penitentiary, and if while so at large he shall so behave and conduct himself as not to incur his reincarceration, then he shall be deemed to be still serving out the sentence imposed upon him by the court, and shall be entitled to good time, the same as if he had not been paroled. But if the said paroled prisoner shall be returned to the said Penitentiary, as hereinbefore provided, then he shall serve out his original sentence as provided for in section 5 of this act."

From the above it will be seen that the paroled convict remains in the legal custody of the commissioners of the Penitentiary until the expiration of his maximum sentence, less the time credited for good behavior, and, necessarily, he must first finish this term before beginning another, unless he be pardoned or tried for another crime and sentenced to death.

The fact of his being in legal custody under the first sentence, however, will not prevent his trial and conviction for any other crime committed during this time, nor will it prevent the trial court from pronouncing another sentence against him.

1 Bish. New Crim. Law, 953.

25 Am. & Eng. Enc. Law (2d Ed.), 303.

2 M. A. S., 1453, provides that "for the purposes of this act, whenever any convict shall have been committed under several convictions with separate sentences, they shall be construed as one continuous sentence."

The provisions of this act would seemingly make it clear that, in a case of this kind, the two separate convictions and sentences should be construed as one continuous sentence, the second to begin at the termination of the first, were it not for the fact that, in the case of In re Packer, 18 Colo., 525, a case in which our Supreme Court affirmed the right of a trial court to impose a sentence for each conviction of a defendant where convicted for five different offenses at the same trial, the court, in referring to this section, at page 530, uses the following language:

"The provision is only pertinent to the question under consideration in this case, in so far as it shows a legislative recogni-

tion of the power of the courts to commit under several convictions, with separate offenses. This can only be carried into effect by making each sentence, after the first, commence at the expiration of the previous sentence."

Again, at page 531:

"The conclusion that one term of imprisonment may be made to commence when another terminates, is not only supported by reason, but, we think, by the decided weight of authority, as will appear from the following citations."

Thus implying that the above section is only declaratory of the common law rule. A like interpretation of a similar statute was also given by the Supreme Court of Missouri in Ex parte Jackson, 96 Mo., 116, 119.

The rule at common law seems to have been that the court in pronouncing the different sentences must state when each sentence begins; otherwise they would all run concurrently.

U. S. vs. Patterson, 89 Fed., 775.
In re Jackson, 3 McArthur (D. C.), 24.
Fortson vs. Elbert County, 117 Ga., 149.
Ex parte Hunt, 28 Pax. App., 361.
Ex parte Gafford, 25 Nev., 101.

However, the contrary of this rule has been held under statutes quite similar to ours in the following cases:

Ex parte Turner, 45 Mo., 331.
Ex parte Kirby, 76 Cal., 514.
Ex parte Durbin, 102 Mo., 100.

On account of this conflict of authorities, and the further fact that in the Packer case our court did not directly pass upon this point, as it was not a question in issue therein, I do not feel at liberty to advise you that the rule has been definitely settled in this State, and until the same has been done, I would recommend that paroled convicts who are convicted and sentenced for crimes committed during their term, should be required first to serve out such term, and then begin the term under the later sentence.

Yours truly,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

## RELIEF BILL.

**A relief bill for a person injured by being compelled to enter a known dangerous place, while confined in the Penitentiary, is a valid claim against the State and not contrary to the Constitution.**

Denver, Colo., December 2, 1903.

HON. JOHN A. HOLMBERG,
Auditor of State,

HON. WHITNEY NEWTON,
State Treasurer,
State Capitol.

Gentlemen—In the matter of House Bill No. 220, for the relief of Louis Bergonia, I have had the same under consideration for several months and have arrived at the following conclusion:

The facts in this case are as follows:

Bergonia was incarcerated in the State Penitentiary at the time of the injury, and at such time was "under the absolute control of the State." Bergonia was ordered by an officer of the Penitentiary to enter an excavation in the rock where quarrying was conducted. He was compelled to go into this place by an order of an officer which he was powerless to resist. The place was supposed to be one of danger, and Bergonia had remonstrated with the officer about entering. On the day previous another convict had refused to enter this place, and had received severe punishment for his disobedience. Bergonia fearing like treatment entered the place, and while at work received the injury which resulted in the loss of a leg.

This relief bill is suspected of being in violation of the Constitution.

"No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the State, nor to any denominational or sectarian institution or association."

Section 34, article V, Constitution.

"No bill shall be passed granting any extra compensation to any public officer, servant or employe, agent or contractor after services shall have been rendered or contract made, nor providing for the payment of any claim made against the State without previous authority of law."

Section 28, article V, Constitution.

The appropriation under consideration is not made for charitable, industrial, educational or benevolent purposes, and, therefore, the first section quoted does not apply.

The bill is compensation to Bergonia for the damage done him by the State.

The other constitutional provision is intended to prevent extra compensation to any public officer, servant or employe, agent or contractor, after services have been rendered or a contract made. It is intended to prevent any increase of compensation to such persons after a contract relation has been entered into. The latter clause prohibits the payment of any claim made against the State without previous authority of law. It prohibits State officers from voluntarily making contracts which create obligations against the State, when no appropriation or authority has been specially conferred upon them for that purpose. For instance, an additional person could not be employed in the Attorney General's office, and thus an obligation be created which would be binding upon the part of the State to pay. The Governor could not buy a piece of land for any of the State institutions and bind the State to pay for it. This provision prohibits officers of the State from entering into an agreement by which the State will be obliged to pay a debt. It is intended as an absolute limitation upon the part of the agents of the State to contract any debts.

In my judgment, it has no reference whatever to a condition like that of Bergonia, where the officers of the State compelled him, over his objction, to enter into a place of known danger. I do not think the State is prohibited from compensating him for such injury. Such an idea is not within the terms of the provisions of the Constitution referred to. It does not place a limitation upon the power of the Legislature of the State which compels it to do an injustice. The Legislature has plenary power, except when limited.

The facts in this case are different from all others that have been considered by this department, or by the courts. The contract relation did not exist between Bergonia and the State, nor did Bergonia have any option in undertaking the duty which he assumed; nor does it come within such cases as members of a posse comitatus. Relief bills in favor of a wife whose husband joined a posse comitatus, under orders, are denied as being unconstitutional. Every citizen of the State assumes the obligation of joining a posse comitatus when ordered. The State may require such service of its citizens without assuming any obligation to pay for damage incurred by those who enter. It is an incident of citizenship and the State has the right to require the service without assuming any obligation. But there is no moral or legal right on the part of the State, through its officers, to compel a convict to enter a place of known danger, and then take away from the State the right to compensate in case of injury.

Such a case does not come within any duty the citizen may owe the State, nor within any other cases which have been declared illegal by this department or the courts.

I am of the opinion that the appropriation is compensation for damage done Mr. Bergonia; that it is not charity or benevolence. It is equally as clear that it does not come under the other constitutional provision, for it does not relate to any contract, and the last clause of section 28, article V, only prohibits an officer or agent of the State creating a liability against the State without previous authority, and does not at all refer to the State paying for damages when the Legislature deems it expedient so to do.

I am therefore of the opinion that the appropriation is valid and should be paid from the class to which it properly belongs.

Respectfully,

N. C. MILLER,
Attorney General.

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## PUBLIC DOMAIN.

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**Public domain, as used in our statute, embraces all land belonging to the United States government which has not been granted to private owners.**

**County commissioners can not lay out road over State lands without permission from State Land Board.**

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Denver, Colo., April 16, 1904.

E. E. HUBBEL, ESQ.,
County Attorney,
Pueblo, Colo.

Dear Sir—In reply to your inquiry as to the meaning of the phrase "public domain," as used in our statutes, I beg to say that the commonly accepted meaning is that the term embraces all the lands belonging to the United States government which have not been granted to private owners.

Black's Law Dictionary, 962.

I think this is the construction intended to be given it as used in section 3931 of Mills' Annotated Statutes, although the United States Land Offices require a survey and a map or plat to be filed in the Land Office before highways, etc., are recognized by the department.

You also inquire if the county commissioners can lay out a road on or over State lands without the permission of the State Board of Land Commissioners.

I think it extremely doubtful that "public domain," as used in the above section, refers to State lands, but even if such were the case, I can see no good reason for failing to comply with section 3652 of the same statutes, which was enacted two years later, and which very fully provides for the procedure in these matters.

Again, the provisions of this latter section have been followed by the State Board of Land Commissioners for years, and, certainly, in continuing to do so, there can be no question of illegality arising in connection with such roads; while, on the other hand, the construction to be given section 3931, supra, to say the least, might be an uncertain one, so I should advise you to be governed by section 3652, supra, especially as the procedure therein laid down is very simple and works no greater hardship than that imposed by the United States Land Office rules and regulations.

Yours respectfully,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

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## RED CROSS MEDICAL ASSOCIATION.

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**When the purpose of a corporation is not charitable or fraternal, but a plan for building up private business, it comes within our statutes, and must be incorporated.**

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Denver, Colo., July 14, 1903.

HON. JOHN A. HOLMBERG,
Auditor of State,
Capitol.

Dear Sir—I have examined the certificate of incorporation of The Arapahoe County Red Cross Medical Association and the by-laws of The Denver Red Cross Medical Association.

Without attempting to harmonize the difference in these names, as I consider that immaterial, the real purpose of this association is not charitable or fraternal, but is manifestly a plan for building up a private business.

Therefore, The Denver Red Cross Medical Association should be incorporated, and is subject to section 2237, M. A. S. This statute excepts organizations which conduct their business as fraternal societies on the lodge system; and organizations which do not employ paid agents in soliciting business; or organizations which limit membership to a particular order, or fraternity, as, for instance, railroad conductors, street car employes, or Odd Fellows.

The benefit that is to accrue to the person holding a contract in this association depends upon physical disability, therefore it is within the terms of section 2237, M. A. S., and there is nothing in the by-laws which places it within the exceptions.

Section 2229, M. A. S., provides that

"All life and accident associations organized under the laws of this State to operate on the mutual assessment plan, shall comply with all the provisions of this act so far as applicable, and shall be under the full supervision of the Superintendent of Insurance."

It will be necessary, therefore, for this association to comply with the statute.

Respectfully,

N. C. MILLER,
Attorney General.

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## REJECTION OF BIDS ON ACCOUNT OF COLLUSION.

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**Right to refuse to receive contract after accepting bid, where there is a collusion among bidders.**

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Denver, Colo., May 19, 1904.

L. G. CARPENTER, ESQ.,
State Engineer.
State Capitol.

Dear Sir—I have your letter asking my opinion upon the following supposed statement of facts, and your question following the statement of facts:

"Suppose that a Board of Construction had advertised for bids, that bids were presented, and that the Board had accepted the lowest bid presented, but however, before signing the contract, it had reason to think that there was collusion among the bidders, and that in consequence, the bids presented were excessive.

"Will the Board be bound by its action, or is it possible to rescind its former action, and re-advertise?"

It is difficult to give an opinion of any value unless there is a concrete case to pass upon. Answering your question, based upon the hypothetical facts stated, I should say "No," because when the Board has accepted the lowest bid, and only thinks there is collusion or fraud among the bidders, it can not refuse to go on with its contract, the contract having been made immediately upon the acceptance of the lowest bid. On the other hand, where fraud or misrepresentation can be proven, a contract can be set aside, because obtained upon misrepresentation and fraud. Moreover, when a Board reserves the right to reject any and all bids, it is not bound to accept any bid.

Before giving you an opinion upon which I would be willing for you to act in public matters, I would like to have you state the facts in the particular case in which the opinion is desired, and cite the particular statute upon which the proposed action is based. I am,

Yours respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

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## EXPENSE OF MESSENGER FOR RECOVERING FUGITIVE.

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**In the absence of the legislature making an appropriation therefor, there are no State funds available to pay expenses of a messenger sent for fugitive from justice.**

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Denver, Colo., January 11, 1904.

HON. JAMES H. PEABODY,
Governor of Colorado,
State Capitol.

Dear Sir—In reference to a letter from Mr. Fred W. Heath, attorney at law, Montrose, Colorado, addressed to you under date of January 9th, 1904, I report to you as follows:

Mr. Heath refers to section 2039, Mills' Annotated Statutes. This statute is in force, but there is no money appropriated by the Legislature to pay expenses incurred under the statute.

It is impossible for the State officers to pay any money out of the treasury, except when an appropriation has been made by the Legislature to cover the expenditure. For years it has been the practice of the Legislature to decline or fail to make any appropriation covering the expenses of a messenger sent by you to obtain a fugitive from justice. It has also been the practice of messengers not to file a bill for such expenses. But it is immaterial whether the messenger files such a bill or not. You are not at liberty to make any expenditure in that behalf, owing to the failure of the Legislature to make any appropriation covering such expenditure.

I, therefore, close the matter with reference to the constitutional provision forbidding the expenditure of any money unless there is an appropriation to cover such expenses.

Article V, section 33, Constitution.

Yours truly,

N. C. MILLER,
Attorney General.

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## REQUISITION.

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Governor has right to revoke his warrant issued for arrest of fugitives. The question of whether or not a person is a fugitive from justice is to be decided by the chief executive. The fact that fugitive was convicted in State other than his domicile, and after conviction pending appeal, returned to his domicile under bond, does not change status of being a fugitive.

Upon proper application, it is the duty of the Governor to surrender a fugitive from justice, but there is no power to compel him to do so if he refuses.

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Denver, Colo., August 12, 1903.

HON. JAMES H. PEABODY,
Governor of Colorado,
State Capitol.

Dear Sir—In regard to the re-hearing of the matter of the requisition of the Governor of the state of Massachusets upon your excellency for the return of Francis L. Burton, an alleged fugitive from the justice of that state in that he was convicted there of the crime of grand larceny and refuses to return to receive the sentence of the court, I beg to say that this office rendered an opinion as to the regularity of the papers in connection therewith on the third instant, and I have no reason at this time to modify the opinion then rendered.

As to the question of your excellency's right to revoke the warrant issued for his arrest at that time, the law is well settled that it is well within your power so to do, if you so desire.

Spear on Extradition, page 440.
Moore on Extradition, section 620.
12 Am. & Eng. Enc. Law (2d Ed.), 605-606.

As to the question of Mr. Burton being a fugitive from justice, I beg to inform you that it is a question to be taken into consideration and decided by yourself, but, however, by the better authorities, your decision in this particular can be reviewed by the courts of our State on a writ of habeas corpus, so that the accused, if not satisfied with your decision in this particular, can still apply to the courts.

8 Enc. Pl. & Pr., page 823.
Spear on Extradition, page 499.

The fact that the crime was committed in Massachusetts, and Mr. Burton was convicted there, and then returned to the place of his domicile in Colorado, does not in any manner change the rule as to being a fugitive from justice.

12 Am. & Eng. Enc. Law (2d Ed.), 603.
Moore on Extradition, section 567.

Further, I desire to add, in this connection, that the following authorities hold that a person leaving a state while out on bail is a fugitive from justice, and can be returned to the state in which the bail was given.

Moore on Extradition, section 562.
In the matter of Hughes, Phill. (N. C.) L., 57.
In re Greenough, 31 Vt., 279.
Com. vs. Otis, 16 Mass., 197.

As to the further question of the right of your excellency to review the action of the trial court or of the Supreme Court of Massachussetts in the matter of the conviction of Mr. Burton, I beg to advise you that the act of Congress in regard to interstate extradition matters provides that, upon compliance with certain requirements therein specified, when a proper demand is made upon the executive authority of any state or territory to which a fugitive from justice has fled, it is the chief executive's duty to cause the fugitive to be arrested and delivered to the proper agent of the demanding state. The better authorities hold that interstate extradition is not a matter of comity and discretion upon the part of the state upon which the demand is made, but rather is an absolute duty imposed by the Constitution and laws of the United States. However, I wish to add

that this duty to deliver the fugitive is a mere moral obligation imposed upon your excellency, and in case of your refusal for any reason that may seem sufficient to yourself, there is no power in the federal or state governments to compel you to surrender the accused.

12 Am. & Eng. Enc. Law (2d Ed.), 605.
Moore on Extradition, section 532.
Spear on Extradition, pages 350-351.

I beg to suggest that, in my opinion, the matters and reasons presented to your excellency for revoking the warrant of arrest heretofore issued by you, may, with equal, if not more, propriety, be presented to the chief executive of the state of Massachusetts so that he may have an opportunity to correct the wrong done Mr. Burton, if such is the case, by the courts of that commonwealth.

Respectfully submitted,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

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## REQUISITION.

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**Upon proper application, it is the duty of the Governor to surrender a fugitive from justice, but there is no power to review his action if he refuses to do so. The Governor is not required to surrender a person charged with crime unless it be made to appear to him in some proper way that such person is a fugitive from justice. A fugitive from justice, surrendered by one state upon the demand of another, is not protected from prosecution for a criminal offense other than that for which he was surrendered.**

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Denver, Colo., April 26, 1904.

HON. JAMES H. PEABODY,
Governor of Colorado,
State Capitol.

Dear Sir—I have carefully examined the request made upon your excellency by the acting Governor of the state of New York for the rendition of Mrs. Mabel L. Wyllie, otherwise Mrs. Mabel Pew, an alleged fugitive from justice, against whom an indictment has been regularly found by a grand jury of that

state, and I find the said papers to be in strict compliance with the rules of practice in interstate extradition matters.

In the hearing allowed to the parties by your excellency in this matter, it is claimed by the alleged fugitive, first, that no crime was committed intentionally by her; second, that she is not a fugitive from justice, but that she came to Denver with her husband for the benefit of his health, and having invested all her money here, has, in good faith, made it her home since first coming here; third, that her return is not sought bona fide for the purpose of prosecution under the present indictment, but rather for the purpose of bringing her within the jurisdiction of the courts of that state to prosecute her for the crime of bigamy.

As to the first proposition, I beg to say that the act of Congress in regard to interstate extradition provides that when a proper demand is made on the chief executive of the state or territory to which a fugitive from justice has fled, it shall be the duty of the chief executive to cause the fugitive to be arrested and delivered to the agent of the demanding state.

Revised Statutes U. S., section 5278.

This is in accordance with section 2037 of M. A. S., as follows:

"Whenever the executive of any other state or of any territory of the United States shall demand of the executive of this State any person as a fugitive from justice, and shall have complied with the requisitions of the act of Congress in that case made and provided, it shall be the duty of the executive of this State to issue his warrant under the seal of the State to apprehend the said fugitive, directed to any sheriff, coroner or constable of any county of the State, or other persons whom the said executive may think fit to entrust with the execution of said process. Any of the said persons may execute such warrant anywhere within the limits of this State, and convey such fugitive to any place within the State which the executive in his warrant shall direct."

The better authorities hold that interstate extradition is not a matter of comity and discretion upon the part of the State upon which the demand is made, but rather is an absolute duty imposed by the Constitution and laws of the United States. However, I wish to add that this duty to deliver the fugitive is a moral obligation imposed upon your excellency, and in case of your refusal for any reason that may seem sufficient to yourself, there is no power in the federal or state governments to compel you to surrender the accused.

12 Am. & Eng. Ency. Law (2d Ed.), 605.
Moore on Extradition, section 532.
Spear on Extradition, pages 350, 351.

As to the second proposition, the better rule seems to be that the Governor of a state or territory is not required to surrender a person charged with crime, unless it be made to appear, in some proper way, that such person is a fugitive from justice.

12 Am. & Eng. Ency. Law (2d Ed.), 601, 604.
Ex parte Reggel, 114 U. S., 642.
Roberts vs. Reilly, 116 U. S., 80.
State vs. Hall, 115 N. C., 811.
Ex parte Smith, 3 McLean (U. S.), 121.
In re Jackson, 2 Flipp (U. S.), 183.

It has been held by some courts that the fact of a crime having been committed by a person in one state, and thereafter, before the crime was discovered, or the person could be arrested, he or she removes to another state and is found there, is prima facie evidence that such person is a fugitive from justice. The better rule seems to be, however, that, while it is not necessary to estabish beyond a doubt that the alleged fugitive from justice has fled from the particular state where the crime was committed in order to escape punishment, it is better to show the facts constituting the offense, and the conduct of the alleged fugitive thereafter, so that it may be judged therefrom whether or not such person left the state to escape detection and remained in another state to avoid punishment.

As to the third proposition, I desire to say that, although there have been decisions sustaining the contrary rule, it may now be regarded as well settled that a fugitive from justice, surrendered by one state upon the demand of another, is not protected from prosecution for offenses other than that for which he was surrendered, but he may be lawfully tried and punished for any and all crimes committed by him, either before or after extradition within that state.

Lascelles vs. Ga., 148 U. S., 537.
People vs. Cross, 135 N. Y., 536.
Williams vs. Weber, 1 Colo. App., 191.

However, I do not consider this a legitimate objection to the return of the alleged fugitive, as the rules of interstate extradition only provide that a fugitive shall not be returned for the purpose of enforcing the collection of a debt, or for any private purpose whatever.

Respectfully submitted,

N. C. MILLER,
Attorney General.

By I. B. MELVILLE,
Assistant Attorney General.

## REQUISITION.

**The application for a requisition should be made in accordance with the rules in force in the State from which the requisition is made.**

Denver, Colo., March 9, 1903.

HON. JAMES H. PEABODY,
Governor of Colorado,
Denver, Colorado.

Dear Sir—Complying with your request for my answer to the inquiry of his excellency the Governor of Missouri, in his letter of the 4th inst., as to wherein the papers accompanying the requisition for Fred Leeper, returned to you on the 28th ult. by me, were deficient, I would say that they failed either wholly or partially to meet the requirements of eight of the interstate rules of practice in extradition, viz.: (a), (b), (c), (d), (g), (h), (i) and 4, a copy of which rules I recommended to be sent to the Governor of Missouri, and a copy of which is hereto attached.

It is evident that the prosecuting attorney followed the general form of application for a requisition adopted in Missouri (see 2 Moore on Extradition, pages 1342, 1343), but it does not follow that this is sufficient in this State.

It is always held that the demanding state ought to comply with the rules and regulations of the state from which the fugitive is demanded.

"Whatever policy, whether by executive or legislative authority, may be adopted by the respective states in delivering fugitive criminals to other states or territories, should become a rule of practice in demanding them. There is no power to compel any state to make such a delivery. Each state, subject to the authority of the Constitution and the law of Congress, exercises its own judgment as to what is required by that Constitution and that law, and as to what rules and regulations shall be observed by the Governor thereof, whether in demanding or delivering up fugitive criminals. From this judgment there is no appeal. It is hence necessary for the demanding state, in making the demand, to conform its practice to the rules established by the state asked to make the delivery."

Spear on the Law of Extradition, page 421.

In other words, the application for the requisition and the papers accompanying the requisition must not only comply with

the rules of the state which makes the demand, but with the state of which the fugitive is demanded.

Spear on the Law of Extradition, pages 419-421.

The state of Missouri itself recognizes this practice of following the rules of the state from which the fugitive is demanded by adopting special rules and instructions for applications for requisitions on the state of Ohio, so as to comply with the Ohio rules. (See 2 Moore on Extradition, page 1340.)

The design of such rules is both to guard against any abuse of the purpose and to promote uniformity in the different states in matters pertaining to interstate extradition.

Governor Hill, of New York, in 1887 invited the Governors of adjoining states to join him in an invitation to the Governors of the other states of the Union to send delegates to a conference to meet in New York City on August 23d, 1887, to consider the adoption of a uniform system of rules and practice in interstate extradition. As a result of this invitation, a conference was held, some twenty states being represented, and on August 24th, the conference adopted the rules attached hereto.

2 Moore on Extradition, 1189, 1192.

These rules were substantially those adopted by Governor Hill, of New York, in 1885. They have since been adopted by many of the other states, until now, I understand, most of the states have sanctioned and adopted them by legislative enactment or executive order. They have been approved and in force in this State practically ever since their adoption by the conference, as the Governors and Attorneys General of this State have fully realized their importance and the necessity of uniformity in such matters.

It is always a cause of regret to me to be obliged to recommend that you do not honor the requisition of a Governor of another state, and where the crime is murder, and the probable guilt clear, I never advise a refusal to honor a requisition for failure to comply strictly with the rules; but where the alleged crime is not so serious, and the extradition is contested, and the ground of the contest, in my opinion, well taken, as in the two recent instances from Missouri, I feel that a compliance with the rules should be insisted upon and the resolution of the conference discouraging applications for the extradition of persons charged with petty offenses, except in special cases under aggravating circumstances, should be followed.

It should not be forgotten that in the first case, viz., that of Henry Ebel, where you declined to honor the requisition of the Governor of Missouri, the grounds for your declination were based upon your determination from the evidence before you that Ebel was not a fugitive from justice, although there

were technical objections to the sufficiency of the papers accompanying the requisition.

Trusting that the above will entirely satisfy his excellency the Governor of Missouri that you were not only justified in declining to honor the requisition in the instance referred to, but that it was the only proper course for you to pursue under the circumstances, I am,

Yours respectfully,

N. C. MILLER,
Attorney General.

By H. J. HERSEY,
Assistant.

The following is a copy of the rules and directions referred to:

## EXTRADITION.

### Inter-State.

### Rules of Practice.

The application for the requisition must be made by the district or prosecuting attorney for the county or district in which the offense was committed, and must be in duplicate original papers or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney:

(a) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled, in capital letters, for example, JOHN DOE.

(b) That in his opinion the ends of public justice require that the alleged criminal be brought to this State for trial at the public expense.

(c) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(d) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(e) If there has been any former application for a requisition for the same person, growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(f) If the fugitive is known to be under either civil or criminal arrest in the state or territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(g) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose what-

ever, and that if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(h) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(i) If the offense charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretenses, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant, that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required or a sufficient reason be given for the absence of such affidavit.

2. Proof by affidavit of facts and circumstances satisfying the executive that the alleged criminal has fled from the justice of the state, and is in the state on whose executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the state where the alleged crime was committed at the time of the commission thereof, and is found in the state upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies in duplicate must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate (a notary public is not a magistrate within the meaning of the statutes), and that a warrant has been issued and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

5. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrant must be duly certified.

6. Upon the renewal of an application, for example: On the ground that the fugitive has fled to another state, not having been found in the state on which the first was granted, new or certified copies of the papers in conformity with the above rules must be furnished.

7. In the case of any person who has been convicted of any crime and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff or

other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence, upon which the person is held, with the affidavit of such person having him in custody, showing such escape with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive, except in compliance with these rules.

## RESOLUTION IN RELATION TO EXTRADITION FOR MINOR OFFENSES.

Resolved, That it is the sense of this conference that the governors of the demanding states discourage proceedings for the extradition of persons charged with petty offenses, and that, except in special cases, under aggravating circumstances, no demand should be made in such cases.

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## SEDITION.

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**Colorado has no statute under which sedition may be prosecuted and punished, but has laws under which persons delivering inflammatory harangues may be punished for inciting to deeds of violence.**

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Denver, Colo., December 14, 1903.

HON. JAMES H. PEABODY,
Governor of Colorado,
State Capitol.

Dear Sir—You have asked my opinion as to the existence of any statute making sedition in Colorado an offense.

I have examined the statutes of the State, and I do not find any law under which sedition may be prosecuted and punished in Colorado.

Sedition is defined: "An insurrectionary movement tending toward treason, but wanting an overt act; attempts made by meetings or speeches, or by publications, to disturb the tranquillity of the state."

Black's Law Dictionary.

"That no law shall be passed, impairing the freedom of speech; that every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse

of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence and the jury, under the direction of the court, shall determine the law and the fact."

Section 10, article II, Colo. Constitution.

The Constitution guarantees freedom to speak as one "will on any subject, being responsible for all abuse of that liberty." In other words, if no crime results from the incendiary talk of the speaker, he can not be punished for he is only responsible for the abuse of that liberty.

The Legislature is not prohibited by this act from defining what may be abuse of the liberty of speech, and it has several sections which bear upon it and impose small fines for the reckless talk of persons. These statutes are found in Mills' Annotated Statutes, from section 1305 to section 1310 and the amendment in Session Laws of 1891, at page 125.

It is the practice to arrest persons who deliver themselves of inflammatory harangues which are calculated to draw around them a crowd and excite them to deeds of violence, under section 1305, of 3 M. A. S., page 366, or Session Laws of 1891, page 125. The penalty is a fine not exceeding $50.00 or imprisonment in the county jail not exceeding 2 months. My judgment is that this statute is sufficiently strong to stop violent speeches which threaten to disturb the peace and quiet of any neighborhood or community.

Respectfully,

N. C. MILLER,
Attorney General.

## CANCELLATION OF CERTIFICATE OF PURCHASE.

**When a legal sale of State lands has been made, and the first cash payment has been made, and certificate of purchase issued providing for payment of the balance in annual payments, and any of said payments remain unpaid for one year, the land may again be sold, and all payments theretofore made will be forfeited to the State. The certificate of purchase must be in accordance with the statute. Any provisions to the contrary are void. The State, in making such contract, is to be considered the same as an individual. When the land is sold all rights of the first purchaser are extinguished, the title not leaving the State until all payments are made. The forfeiture will not be complete until the board has exercised its right to sell the land again, and it is advisable that the notice of forfeiture be given the first purchaser, so that he may have an opportunity to complete the sale. The board has no power to return any of the payments made, nor to give a patent for a pro rata portion of the land.**

Denver, Colo., March 4, 1903.

TO THE STATE BOARD OF LAND COMMISSIONERS
Denver, Colorado.

In response to your recent request for my opinion as to the power of your board to cancel certificates of purchase issued under the act approved April 2d, 1887, which act, among other things, prescribed the powers and duties of your board, I have to say as follows:

I will assume that a legal sale has been made to a purchaser of said lands, and that the first cash payment has been made thereon, as required, and a certificate of purchase issued to the purchaser providing for the payment of the balance of the purchase money in seven equal annual payments with interest, as provided by section 15 of said act, approved April 2d, 1887, which act is found in the Session Laws of 1887, page 328, et seq., and that the purchaser has failed to make one of the annual payments stipulated in said certificate, which remains unpaid for one year after the time when it should have been paid.

By section 16 of said act, it is provided as follows:

"If any purchaser of State land, after receiving a certificate of purchase, as provided in section 15 of this act, fail to make any one of the payments stipulated therein, and the same remains unpaid for one year after the time when it should have been paid, as specified in such certificate, the State Board of Land Commissioners may sell the land again; Provided, That in case of a sale, all previous payments made on account of such

land shall be forfeited to the State; the land shall revert to the State, and the title thereof shall be in the State as if no sale had ever been made."

It will be seen from the plain language of this section of the act that if an annual payment remain unpaid for one year the State Board of Land Commissioners may sell the land again, and all previous payments made on account of such lands shall be forfeited to the State and the title to such lands shall be in the State as if no such sale had ever been made.

The form of certificates of purchase used by your board under said act aproved April 2d, 1887, specifically provides that the purchase of the lands described in such certificates is made under and subject to the provisions of said act, and that the purchaser will be entitled to a patent to the land upon the day specified, upon surrendering the certificate, and upon fully complying with all the provisions of the statutes in such cases made and provided, and upon the payment of the balance of the purchase price, as specified with interest.

It is also provided by the express terms of said certificate of purchase that time is of the essence of the contract, and the purchaser agrees, in accepting the certificate, to make the payments as specified therein, and upon his failure to do so, that he will immediately vacate the premises, and that his thereafter remaining in possession shall be unlawful, and the occupier may be summarily ejected, and the right to possession shall revert to the State of Colorado.

The rights of the State, therefore, as vendor, and the rights of the purchaser are to be found in and determined by said act, approved April 2d, 1887, and the certificate of purchase.

I need hardly remind you, however, that if the certificate of purchase contains any stipulations in conflict with the statute, such stipulations are without any force or effect.

The question, then, is one of the construction of a contract, based upon the statute and by the terms of which contract the purchaser agrees that if he shall default in any annual payment for the period of one year after the time when it should have been made, that the said Land Board may sell the land again, and that in case of such a sale all previous payments shall be forfeited to the State, and the land shall revert to the State and the title thereof shall be in the State as if no sale had ever been made.

It has been contended by some that the board has no power to cancel such a contract, and if the board should assume to do so, and sell the lands to a second purchaser, the latter would hold the title in trust for the first; and that before there can be any lawful cancellation by your board, there must be a judicial determination by the decree of a competent court that there has been a failure on the part of the purchaser to comply with the

terms of the contract, and, therefore, a forfeiture of all rights thereunder.

I do not think that this is a correct statement of the law. An examination of the decisions of the Supreme Courts of other states on similar statutes will show that your board has the power to effectually cancel certificates of purchase in the case of default in an annual payment for a period of one year, by selling the land again; and the title, being in the State in such case, as if no sale had been made, the second purchaser acquires a good title, and there is no necessity of any judicial determination or decree of forfeiture.

In Texas the State Land Board is composed of much the same officers as your board, having practically the same powers, and the payments on the purchase of land are one-thirtieth, and one-thirtieth of the purchase money annually thereafter, with interest at five per cent. per annum, payable on the 1st day of March of each year.

By section 10 of the Texas statute, it is provided that if on March 1st of any year the interest is not paid, the custodian of the purchaser's obligation shall endorse thereon "Lands Forfeited," and the account kept with the purchaser shall show such failure to pay and such forfeiture. I may say that there is no statutory provision in Texas for the giving of any certificate of purchase to the purchaser, but section 9 of the Texas statute provides for the purchaser giving his obligation to the state, binding himself to pay the balance of the purchase price, and interest. This act was passed in 1883, and will be found in General Laws of Texas, 1883, pages 85-89.

In 1885 the power to declare a forfeiture, as provided by the act of 1883, was taken away, but in 1887 it was restored by an act passed that year.

On October 8th, 1883, while the 1883 law was in effect, one Bennick purchased certain lands through the State Land Board of Texas, but in 1892 defaulted in the payment of interest, and the lands purchased were therefore declared forfeited under the provisions of the act of 1883. Subsequently, one Fristoe purchased the same lands of the state, the State Land Board having sold them to him after they had declared them forfeited without any judicial determination. Whereupon, Blum, a grantee of Bennick, brought suit against Fristoe to recover the land from Fristoe, the second purchaser, we may call him, but the trial court gave judgment for the defendant Fristoe. This judgment, upon appeal, was reversed by the Court of Appeals, and another appeal taken to the Supreme Court of Texas. The Supreme Court thereafter reversed the Court of Appeals and sustained the trial court. I should say that the Texas statute provides that "a failure to pay the interest will ipso facto, work a forfeiture, and an entry on the accounts shall

be evidence of the fact, and there shall be no necessity for judicial ascertainment of the facts of the forfeiture."

It was contended by Blum's counsel that, as there had never been any judicial determination of the forfeiture as required by law, there was no divestiture of his client's title, and that, therefore, the purchase of Fristoe was of no force and he had no title.

As the powers of the Texas State Land Board and the powers of your board are practically the same, the decision of the Texas Supreme Court in this case is both instructive and pertinent, and so I shall make numerous references to that opinion. The case referred to is

Fristoe vs. Blum, 92 Texas, 76.

It is held in the above cited case, and it is a correct statement of the law, that, so long as the state is engaged in the discharge of governmental functions, it is to be regarded as sovereign, but when it becomes a party to a contract with a citizen, the same law applies to it as under like conditions governs the contracts of an individual. So, one who contracts with the state to acquire lands upon the completion of the deferred payments thereon, acquires, so long as he pays the purchase money and interest, rights in the land of which the state can not deprive him; but the state has, by common law, the right as a vendor upon the purchaser's failure to perform his part of the contract, to rescind the sale made to him and resume its control of the land, for, as the above Texas case holds "the contract was purely executory, and the superior title remained in the state, the same as it would have remained in the individual under like circumstances."

Fristoe vs. Blum, 92 Texas, 76-80-81.

Indeed, until full compliance with the terms of the purchase by the purchaser, the state never parts with the title to the land, so that upon the failure to perform his part of the contract by the purchaser, such as failure to pay the stipulated interest, or to make the annual payment at the time required, the right of purchase has lapsed, and the state can assert its superior right, the same as any other vendor could do under like circumstances.

Fristoe vs. Blum, 92 Texas, 76, 83.

Moreover, the right of the state to declare a forfeiture is not derived from the Legislature, but existed at common law, as the Texas Supreme Court held in the above cited case (see page 84 of the opinion), "Neither the right of the state as a vendor, nor the remedy by rescission of the sale was given by the statute of 1887; both existed at common law. The Legislature might have rescinded the contract by an act passed for

that purpose, or it had the right, as it did, to empower some officer to put in force its remedy."

Fristoe vs. Blum, 92 Texas, 76, 84.

It is often said, and truly said, that forfeitures are not regarded by the courts with special favor, but this does not mean, as it is often incorrectly intimated, that forfeitures are not regarded by the courts, for, on the contrary, they are always sustained, where the proof is clear that the party claiming forfeiture is entitled to it.

If there be any hardship or ground for relief, then the vendee must apply to a court of equity; yet, if parties under no disabilities choose to contract for a forfeiture in the absence of any fraud or improper practice on the part of the vendor, a court of equity even can not afford the vendee any relief against the same. Parties have the right to make their contract as stringent as they please, and to make time of the very essence of the contract; and if one party, without the consent of the other, allows the specified time to pass, no matter for what cause, without performing the condition, the stipulated consequences must follow.

Warvelle on Vendors (2d Ed.), section 807.

But the word forfeiture is often inaptly used, and, I think, as applied to the power of your board to sell lands upon the default in the annual payments, is incorrect, for a purchaser acquires nothing under his certificate of purchase but the right to acquire the title upon a compliance with all the terms of the contract and a performance of the conditions precedent, which conditions are set forth in said act, approved April 2d, 1887, and the certificate of purchase issued by your board under the authority of said act.

The failure to make the payment, when time is of the essence of the contract (as it is both by the reasonable construction of the terms of said act, approved April 2d, 1887, and the language of the certificate of purchase), causes a lapse or termination of the right of the purchaser to acquire title to the land from the State, and the State does not, strictly speaking, declare a forfeiture through your board, but rather asserts its superior right to the land, the title to which it has never parted with and does not part with until a full compliance by the purchaser with the terms of his purchase has been made.

Fristoe vs. Blum, 92 Texas, 76, 85.

But I shall continue to use the word "forfeiture" in this opinion in its general sense, and as including the state of facts suggested in the last preceding paragraph, as well as others.

The Supreme Court of Texas, in the case above cited, held that the act of entry upon the obligation of the purchaser and

upon the books of the State Land Board of the words "land forfeited," was not a judicial act, nor the exercise of a judicial function, saying:

"The act is no more judicial when performed by the commissioner of the general land office in behalf of the State, than it would be if done by an individual vendor or his agent."

(See page 85 of the opinion.)

So, if your board, under the said act approved April 2, 1887, upon the failure by the purchaser to make, as required by said act, an annual payment, determines to sell said lands to any other purchaser, that sale terminates any and all rights of the first purchaser to the land and forfeits the moneys paid to the State. The land reverts to the State, and the title thereof is in the State, as if no such sale had ever been made.

It is just exactly the same as if one private individual has made a contract of sale with another individual, stipulating therein for the payment of the purchase price in installments at specified times, and that the failure on the part of the purchaser to make one or more of the payments within the time stipulated, time being made of the essence of the contract, should cause payments previously made to be forfeited and the contract terminated.

The right of forfeiture is a privilege of the vendor, and he may treat the contract as void or of no force after the vendee fails to fulfill the conditions of his contract as he sees fit, and the vendor is entitled to the substantial fruits of the forfeiture, such as the retention of all payments previously made.

Warvelle on Vendors, etc., sections 810, 812.

Kansas formerly had a statute very similar to ours, in reference to the sale of state lands, and which provided, among other things that upon the failure of the purchaser to pay the annual interest when it became due, or the balance of the purchase price, that "the purchaser shall forfeit all right to the land from the time of said failure of payment." Judge Brewer, in

State of Kansas vs. Emmert, 19 Kan., 546,

held that upon the failure to pay the annual interest at the stipulated time, the land is, ipso facto, absolutely forfeited, and no judicial proceeding is necessary to determine it. In speaking of the powers of the Legislature in such matters, he says:

"It can make the forfeiture absolute upon the mere fact of non-payment, or it may leave the matter open for further decision and retain an election to pursue its remedy upon the bond, or obtain a judicial declaration of forfeiture. It is not, therefore, a question of power, but one of construction. What did the Legislature intend, and what is the fair import of the

language used? It seems to us clear that there is a legislative declaration of forfeiture in advance, and that upon the happening of the event, the forfeiture occurs, and no judicial proceeding is necessary to determine it."

State of Kansas vs. Emmert, 19 Kan., 546, 548.

See, also,

Ewing vs. Baldwin, 24 Kan., 82.

Subsequently the Kansas act was amended so as to require sixty days' notice before forfeiture, otherwise it is the same as at the present time.

In California, under their statute, a failure to pay the interest annually and to pay the principal at the end of five years, works a forfeiture in the purchase of state lands, and the state may resell, as if no purchase had been made, and no judicial determination of the forfeiture is necessary, it being held that the failure to pay, ipso facto, worked a forfeiture. In the California case below cited, it was claimed that there could be no forfeiture in fact, because of the purchaser's failure to pay the annual interest until it had been declared by a competent tribunal; that the statute merely specified certain facts, which, being proved, furnished the basis for a judgment of forfeiture. But the Supreme Court of California held that it was intended by the act "to make the failure to pay the interest for one year after it became due operate as a complete forfeiture of the purchaser's rights in and to the land. Had it been designed that the officers charged with the sale of these lands should delay further action until the forfeiture had been judicially determined, it would have been so expressed in the act; but, on the contrary, that section provides that a failure on the part of the purchaser to pay the interest, etc., "shall work a forfeiture of such lands, and the same shall be resold, as if no purchase had been made. The last clause would be useless if the re-sale could not be made until the forfeiture had been pronounced by a court, when, of course, the lands would be subject to sale without further directions."

Borland vs. Lewis, 43 Cal., 569, 572-3.

The language of our statute is that:

"If any purchaser of State land * * * fail to make any one of the payments stipulated therein, and the same remains unpaid for one year, * * * the State Board of Land Commissioners may sell the land again, provided, that in case of a sale, all previous payments made on account of such lands shall be forfeited to the State; the land shall revert to the State and the title thereof shall be in the State, as if no such sale had ever been made."

Section 16, Session Laws, 1887, pages 334-5.

It will be noticed that the language of our statute and the language of the California statute are so similar that the California case above cited is particularly in point. The case of

Borland vs. Lewis, 43 Cal., 569,

above cited, was affirmed in a later California case, namely,

Arcata vs. A. & M. R. R. Co., 92 Cal., 639, 646.

The latter case holds that, on "the commission of the offense which is the statutory basis of forfeiture, the title to the thing forfeited immediately vests in the state."

In a Wisconsin case, which arose upon the purchase of swamp lands from the state, it was held that, where state lands, once sold, had been forfeited for a default in the payment of principal and interest, the certificates of sale, by their terms, and by force of the statute under which they were issued, become utterly void and of no effect, and it was not thought necessary to have a judicial determination of the fact of forfeiture of any of the rights under the certificate.

Conklin vs. Hawthorne, 29 Wis., 476, 480.

See, also,

Kennedy vs. Strong, 14 Johns., 129.

Bennett vs. Art Union, 5 Sanford, 614.

N. Y., H. & N. R. R. Co. vs. B. H. & E. R. R. Co., 36 Conn., 196.

In a case in the United States Court, Justice Marshall held that,

"Where a forfeiture is given by the statute, the rules of common law may be dispensed with and the thing forfeited may either vest immediately, on the performance of some particular act, as shall be the will of the Legislature. This must depend upon the construction of the statute."

U. S. vs. Grundy, 3 Cranch, 337.

However, in construing the particular statute in that case involved, the decision was adverse to the forfeiture, ipso facto, for that statute expressly provided for an alternative, which alternative clearly gave an election, and until the election was made, the court properly held there was no forfeiture, the alternative being either the forfeiture of the ship, or the value thereof to be recovered in the suit. In our statute, however, there is no alternative.

It is, however, generally held, that forfeiture is not complete so as to vest property in the person who is to take by the forfeiture until some affirmative action has been taken by the latter.

13 A. & E. Ency. Law (2d Ed.), 1078, and notes;

and I am of the opinion that under our statute approved April 2d, 1887, forfeiture would not be complete until your board had exercised its right to sell the land again, as the language of the statute is: "the State Board of Land Commissioners may sell the land again," etc., in the case of default of an annual payment for the period of one year.

Section 16, Session Laws 1887, page 335.

Moreover, inasmuch as forfeitures are not regarded with any special favor by the courts, and any party insisting upon a forfeiture must make clear proof to show that he is entitled to it (Warvelle on Vendors (2d Ed.), section 807), I think it would be desirable, although I do not deem it absolutely necessary, that reasonable notice of the intention of the board to declare a forfeiture of the contract of the sale of land under the act approved April 2, 1887, if strict performance be not made with the terms of the contract, be given to the purchaser, together with an offer to issue patent upon the payment of the delinquent annual payments and interest.

Warvelle on Vendors (2d Ed.), sections 815-816.

The statute, however, does not require any such notice, and it would be merely a courtesy to give it.

It can not be said that section 16 of the act approved April 2, 1887, is non-enforcible by reason of either the fact that courts are loath to enforce a forfeiture, or, by the further reason that it is a question whether this section is constitutional or not, because as no property can be taken from an individual without due process of law, or without just compensation therefor, for in addition to the reasons given in the decisions hereinbefore cited, there is a further reason that the provisions of this statute are not only enforcible, but they are, in a sense, self-executing, as section 17 of the same act provides: "That all purchase moneys arising from the sale of lands shall be paid by the State Board to the Treasurer, who shall receipt for the same and the same shall be by him credited to the permanent fund to which the land sold belonged."

No permission being given by this act, or any other act for a suit by the purchaser against the State or any of its officers, for the recovery of such moneys, there is no power by which the moneys after having been once paid into the treasury of the State, can be taken out of the treasury, except by legislative act.

The contention that there is no forfeiture of the amount paid by the purchaser upon the default of any subsequent payments, and that in case of default the moneys previously paid are to be returned upon the cancellation of the certificates, is not well founded, because it is impossible to procure a return.

The Legislature, therefore, had in mind not only the general proposition of law above laid down in the authorities cited, but the practical impossibility or undesirability of providing any different procedure.

The powers and authorities of your board are confined to the provisions of the Constitution of this State and the acts of the General Assembly, and you can do nothing except as therein authorized, or as may be necessarily implied in order to carry out the duties and powers therein imposed upon your board.

Attorney General's Report, 1889-1890, page 79.

Therefore, in my opinion, you have no power where only a portion of the annual payments of the purchase land described in the particular certificate of purchase has been made, to issue a patent for the pro rata proportion of the land; your power and duty under the statute being either to waive the forfeiture and give further time, or to resell the land upon the failure to pay the balance due, together with the interest thereon. Indeed, probably the sale of lands would be more in keeping with the constitutional duty of your board, which is to provide for the sale, etc., of State lands "in such manner as will secure the maximum possible amount therefor."

Section 10, article 19, Colorado Constitution.

It is well said in the opinion of Attorney General Jones thirteen years ago to a previous board, "a certificate of purchase does not of itself convey the title, but is a mere contract to purchase * * *. Before a sale becomes binding upon the State, every preliminary step provided by law, particularly payment, must be complied with. Till then, the law is a mere offer; but when compliance is made, it becomes a contract."

Attorney General's Report, 1889-1890, pages 83, 87.
Campbell vs. Wade, 132 U. S., 34.

"The tenor of the whole Land Act excludes the idea that the title to any land passes from the State to any proceeding or evidence of title issued by the board short of a patent or other conveyance in fee simple."

Attorney General's Report, 1889-90, page 79.

This has been made still more clear by the amendment of 1889 to section 21 of the Land Act, which exempts State land sold under the act from taxation "for and during the time : which the title to said lands is vested in the State of Colorado

Session Laws of 1889, section 21, page 313.

This shows conclusively that it was the Legislature's construction of the act that the title did not pass from the State

to the purchaser until all the requirements of the statute and the certificate of purchase had been fully complied with, and the right of the purchaser by such compliance to a patent had become vested.

The right of your board to cancel certificates of purchase issued under the act approved April 2, 1887, and to sell the lands again where there has been a default in an annual payment and it remains unpaid for one year after the time when it should have been paid, is, in my judgment, clear.

Respectfully submitted,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

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## STATE LAND BOARD—LEASE.

In re lease No. 9088.

Denver, Colo., September 8, 1903.

MARK G. WOODRUFF, ESQ.,
Register State Board of Land Commissioners,
State Capitol.

Dear Sir—In reply to your letter of the 5th inst., with enclosures, in reference to the misrepresentations as to the ownership of improvements by F. C. Eberly in his application for a lease, upon which lease No. 9088 was issued, I would say that it appears from the application of Eberly, bill of sale from Elisa Furer to Hugh Roberts, et al., and the affidavit of L. T. Roberts that at the time Mr. Eberly made his application for a lease to the 16 acres of land in Jefferson county, that Mr. Roberts and not Mr. Eberly, was the owner of the improvements, valued at something over $2,000, although Mr. Eberly states that he was the owner.

It also appears that Mr. Roberts was a sub-lessee of Mr. Eberly for a considerable period for the same land which was held by Mr. Eberly under a prior lease.

Under these circumstances, I am of the opinion that lease No. 9088 was procured by Mr. Eberly through deceit and misrepresentation, and if the board so finds, they have power, under section 3637 of Mills' Annotated Statutes, to cancel the lease

of Eberly, and if they so determine, lease the land to other parties after following the usual procedure.

I am yours truly,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

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## RESERVOIR SITES.

**The State Land Board has power to grant a right of way upon State lands for reservoir sites, upon such terms as it may determine, without previous advertisement, and without reference to legal subdivisions. The benefit of this provision was intended for the individual, and not for the State.**

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Denver, Colo., June 25, 1903.

STATE BOARD OF LAND COMMISSIONERS,
Capitol,
Denver, Colo.

Gentlemen—There seems to be an increase in the number of applications for rights of way for reservoirs, and in this connection some controversies appear to arise as to the construction of Statutes 3652 and 3657, M. A. S.

In many cases the board has induced applicants for reservoir sites to purchase the entire division on which the same was to be located, thus avoiding all questions concerning location of right of way for reservoir.

In reference to the power of the State Board of Land Commissioners to grant a right of way over or upon State lands, for reservoirs, I would say that the power and authority of the board is the same as its power and authority to grant right of way for telegraph line, right of way for ditch, public highway, and railroads. All the language of Statute 3652, which is applicable to any one of these, is also applicable to right of way for reservoir. There can be no distinction as to the one that does not exist equally and as forcibly as to the other.

It is impossible to condemn the lands belonging to the general government or to a state, and the rights of way for any of the purposes enumerated in Statute 3652 can not be obtained without the aid of such a law. The general government, therefore, passed a liberal statute allowing an individual to obtain

a right of way for a ditch or a reservoir site by surveying the same and filing the plat with the commissioners of the land office, and in the local land office.

The idea of this statute was to confer upon the individual who needed a reservoir site for the purpose of his own irrigation, the power to obtain it.

Now, this statute could not benefit the individual if, every time a need arose, the land must be submitted to competitive sale, for this might defeat the very purpose of the act, and prevent the individual from obtaining that which is indispensable to his object.

It was necessary for the State of Colorado, also, to provide some way by which individuals could obtain right of way for ditch and reservoir, and the purpose of this statute was a relief from a condition which prevented the individual from obtaining such easements by legal process.

Now, when it becomes necessary for any person, or associations of persons, to construct a reservoir to water his or their lands, it would serve no good purpose if some rival was always to be afforded the opportunity to defeat them in their project. My own notion is that this statute is designed to take the place, precisely, of the means of obtaining a right of way over State lands which is afforded the individual by the eminent domain act, of obtaining a right of way over the lands of private persons.

It must be conceded that if any individual, or association, required, by a necessity existing, a right of way over the land of a private individual, he has the right to secure it by condemnation proceedings and no rivalry will be allowed to obstruct him. As this procedure was not open to the individual in the case of State lands, it was necessary to provide some means of relief for him, and, therefore, the State passed the particular statute in controversy, and that statute is designed for the benefit of the individual, and not of the State. Its object is to enable settlers in any community to obtain rights of way for all the various purposes mentioned, with a view of promoting the development of the country and advancing their welfare. My own notion is, that, as between companies whose object it is to sell water to individuals at a profit and the actual consumers of water, that the latter should be preferred, and this choice is optional entirely with the State Board of Land Commissioners.

Reference has been made to section 3657, as, in some manner, indicating that there must be an advertisement. I am unable to find that these statutes have any reference to each other, and I do not believe that they are to be considered in connection with each other.

The object of section 3657 was to promote the recovery of arid lands, and to place them under water, thus, in a general way, advancing the general welfare of the State.

At the time of the adoption of this statute, it was believed that much encouragement was necessary to secure a reclamation of arid lands, and the purpose of that statute is similar to that of the desert land act of the general government.

A different price is fixed for the sale of land in the latter act, from the price which must be secured for lands which can be watered. But so rapidly has the desire for lands increased in the State of Colorado, that it is no longer necessary to offer inducements for their sale. Especially is this true, where, by any possibility, the land can be watered. Lands that can be watered readily sell for from six to twenty dollars an acre, if it is at all feasible to irrigate them, and the result is that Statute 3652 is practically a dead letter, and is no longer used by the State, and a sale of land under it would not be countenanced unless in a very rare instance, which seems not to have presented itself for some years.

But the purpose of the statute, nevertheless, was undoubtedly to encourage people to place the State lands under irrigation, similar to the desert land act of the general government.

And it will be further observed that section 3652 was passed in 1887, and section 3657 in 1889, and that the title of the latter act is as follows: "An act providing for the sale and irrigation of State lands."

I am, therefore, of the opinion that the board has full power and authority to grant a right of way upon the State lands for reservoirs, upon such terms as it may determine, and without previous advertisement, and without reference to legal subdivisions, and that the benefit of this act was intended for the individual or association of individuals, and was not intended for the benefit of the State. It was a relief from a condition which existed, affording to the individual means of obtaining right of way, where, without the statute, none could be secured.

Respectfully,

N. C. MILLER,
Attorney General.

## BILLS FOR PRINTING.

**Where bills are presented for public printing, they should only be audited and allowed for the statutory amount authorized.**

Denver, Colo., April 1, 1903.

HON. R. G. BRECKENRIDGE,
Chairman Committee on Appropriations,
House of Representatives,
State Capitol.

Dear Sir—In addition to my opinion to you of the 28th ult., in reference to the printing of reports of the State officers and public institutions, I desire to call your attention to the opinion on the same matter by Attorney General Carr to Hon. A. B. McGaffey, Secretary of State, dated January 26, 1895, in which the Attorney General elaborately discusses the statutes relating to the printing of reports, as they then existed, and in which he arrives at the same conclusion that I have arrived at in my opinion to you of the 28th ult.

The following quotation from his opinion is sufficient for present purposes:

"Section 28 of article V, of the Constitution, is as follows: 'No bill shall be passed providing for the payment of any claim made against the State without previous authority of law.' Hard as it may seem upon the parties who have taken contracts and printed these voluminous reports, I can see no way in which the State can be held responsible to reimburse them for their expenditure.

"The law, in my judgment, is mandatory, and no officer of the State can disregard it. Any contract made by any State officer in violation of the statute is void and not binding upon the State.

"The State Auditor has no authority to draw warrants in the payment of any printing bill extending beyond the statutory limit; if such a warrant were drawn, the treasurer would pay it at his peril.

"Any other construction of the statutes under consideration would be too dangerous to consider for a moment.

"Admit that the statutory limit can be exceeded at all, and there is absolutely no limit to the printing bills that could be brought against the State. Admit that any State officer or any State board has discretion in the matter, and there is no limit to the exercise of such discretion.

"The only safe course for you to pursue is to plant yourself squarely upon the statutes and be guided strictly by them.

"I advise you in all cases where bills are presented to you for printing more than the statutory amount of matter, to audit the same pro tanto, and certify to the Auditor the amount due for printing the statutory number of copies, each containing the statutory number of pages."

Attorney General's Report, 1895 and 1896, pages 69, 74-75.

I desire further to say in response to the suggestion that has been made publicly, that the failure to pay bills for the excess of pages over the statutory limit would work a hardship; that this was discussed and decided in the case of Henderson vs. Lithographing Company, 2 Colo. Appeals, 251, 257, 258, which case was subsequently affirmed by the Supreme Court of Colorado in Henderson vs. Lithographing Company, 18 Colo., 259, 264, in which the Court of Appeals says:

"But, neither moral or legal obligation of the State to pay a debt would authorize an officer to pay when not authorized by law, nor would such legal or moral obligation of the State protect an officer in the payment, if such payment was prohibited by the Constitution."

Respectfully,

N. C. MILLER,
Attorney General.

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## PRINTING.

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**The printing for the World's Fair Board should be furnished through the Secretary of State.**

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Denver, Colo., February 3, 1903.

TO THE BOARD OF ST. LOUIS WORLD'S FAIR MANAGERS OF COLORADO.

Gentlemen—I have received your inquiry asking if the opinion in relation to printing furnished the Secretary of State's office, January 30, 1903, applies also to your department.

I have examined chapter 95, Session Laws of 1901, creating your board and defining its powers, and sections 7 and 10 seem to specify what the authority shall be and its mode of exercise.

As a general principle, I would state that the matter of separate funds does not control the interpretation of statute

3663, M. A. S., volume 3. The construction is governed solely by the power of the different departments, and, unless there is something clear and certain, excepting special departments from the operation of the statute, they all come under it.

Section 7 says:

"The commission shall be authorized to solicit and collect subscriptions of cash from boards of county commissioners, etc. * * *, which subscriptions shall be used to defray, in part, the expenses of the commission as it may direct."

The expression "as it may direct," simply means that other persons than the commission shall not say what the objects shall be for which the money is to be expended, but when the object is once settled, if the expenditure should be one that comes within the statute 3663, M. A. S., the method of expenditure would still be controlled by that statute.

Section 10 says:

"No officer of the commission, nor any member thereof, shall in any way or manner contract any indebtedness or create any liability whatsoever on account of said commission, without having first obtained authority from the commission. The commission shall audit all accounts and issue vouchers for the payment of all items, such vouchers to be directed to the treasurer of the commission and signed by the commissioner-in-chief or the president or the vice-president, and attested by the secretary, and the treasurer shall not pay out any moneys in his hands as such, except upon such vouchers."

Section 3 provides:

"The members of said commission shall meet in the State Capitol building within fifteen days of the date of their appointment, and at once enter upon the discharge of their duties and effect an organization by the election of a vice-president, a secretary and a treasurer."

The statute in relation to public printing is a peculiar one, and a similar statute applies to cities and towns and counties and to the State, and for some strong reason, the Legislature has seen fit to prohibit any departments of State, or municipal government from letting its printing, except under contract, and it is provided how this contracting shall be done, and, although your board may have the entire control of what you may desire to purchase, and of the funds and the payment of them out, yet when it comes to those objects that are mentioned in statute 3663, M. A. S., your method of procuring them is therein defined.

The purpose of that statute is to concentrate the purchase of all supplies therein named, in the hands of one person, and to provides the machinery there for the protection of the State, as well as a measurer of printing and a purchasing agent, whose exclusive duties shall be to keep informed on prices and be able to procure them cheaply.

Now, to say that this may have been abused in the past, furnishes no reason why that particular work shall be scattered around the several departments, without any check or restraint, but the safe way is to centralize it and then it is possible for the executive officer to scrutinize the operation of the particular machinery designed for the protection of the State, and if it is not faithfully applied, to change it, and see that it is strictly enforced.

The fact that you pay these bills after they are contracted in this method, makes no distinction, because, if that were true, all the Legislature would have to do would be to make a change in the methods of payment of bills in the different departments, and at once the force of the statute would be dissipated, as, for instance, at one time, nearly all of the departments did have contingent funds for the payment of their own expenses. This has since been wiped out and put in the hands of the Auditing Committee. The statute itself does not take into consideration the method of payment, or who makes the payment. It simply requires that the work shall be done through that one department—the Secretary of State's office—when the nature of the supplies comes within the clause mentioned in 3663, M. A. S.

Respectfully,

N. C. MILLER,
Attorney General.

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## PRINTING.

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Act of 1903, section 17, does not repeal previous act, defining the duty of officers in regard to the publication of reports and the number of pages.

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Denver, Colo., November 21, 1904.

HON. W. A. PLATT,
Commissioner of Printing,
State Capitol, Denver.

Dear Sir—I have your inquiry concerning section 17, chapter 152, of the Session Laws of 1903. You desire to know whether section 17, reading as follows:

"* * * * All laws, messages of the Governor to the General Assembly or to either house thereof, and all reports required to be printed, shall be of uniform size. No report of any officer or board shall exceed 100 pages, except the reports of the Auditor of State, of the State Superintendent of Public Instruction, State Engineer, Labor Commissioner and the Com-

missioner of Mines, each of which five may be 300 pages, but no more,"

is repealed by chapter 93 of the Laws of 1901.

The title of chapter 152 of the Laws of 1903, reads as follows:

"An act in relation to public printing, providing penalties for violation of the provisions of this act, and repealing all acts and parts of acts in conflict therewith."

Where the act creating an office or a department specifies the duties of the office, the act in relation to printing can not detract from that duty. There are few instances of this kind. Almost all the acts require the departments to publish a report of their proceedings, and the act of 1901, under a proper title, limits the extent of such a report. The act of 1901 is intended as a limit upon these reports, and becomes part of the duty of the officer covered by that act.

Section 17 of the act of 1903 does not modify or repeal section 2 so far as the number of pages contained in a report is concerned, but it does amend that statute as to style, material and number of pages to be published.

The law requires officers to print their proceedings up to the limit of 300 pages, and prohibits, under a heavy fine, any excess of that; and any reports printed in excess of that number of pages will not be authorized by any law to be paid. This matter is covered by my previous opinion to the Legislature.

Yours truly,

N. C. MILLER,
Attorney General.

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## SALARIES AND EXPENSES OF COMMISSIONERS OF PENITENTIARY AND REFORMATORY.

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**The commissioners of the Penitentiary and Reformatory should receive separate salaries from each institution and separate mileage for attending the business of each. It is discretionary with the commissioners whether they meet each month, or not oftener than once in three months.**

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Denver, Colo., February 2, 1903.

HON. JAMES H. PEABODY,
Governor of Colorado,
Capitol Building.

My Dear Sir—You have referred to me the following questions in relation to expenses and salaries of commissioners of the Penitentiary:

1. What is the correct construction of the statute in relation to mileage payable to the commissioners for each visit?

2. The commissioners of the Penitentiary being also the commissioners of the Reformatory, do they draw a salary of $400.00 for each institution, or is such salary paid them for the combined service rendered the two institutions?

3. Mr. White, it is stated, draws only $300.00 a year, but charges $32.00 mileage from Denver per trip, while the railroad fare is $11.50 for the round trip.

4. The board meets now monthly, instead of quarterly. Are monthly meetings legal?

Section 3409, M. A. S., provides:

"The members of the Board of Commissioners shall each be allowed the sum of $400.00 per annum and mileage at the rate of ten cents per mile for each mile necessarily traveled in the discharge of their duties, and the Warden of the Penitentiary, etc. * * * And the State Auditor is hereby authorized to draw his warrant for the same upon the presentation of a certificate signed by the president and attested by the secretary of the Board of Commissioners."

Under this statute, I am of the opinion that each commissioner is allowed 10 cents per mile for each mile necessarily traveled in the discharge of his official duties.

Section 4140, M. A. S.:

"The government of the State Reformatory shall be vested in the Board of Penitentiary Commissioners, who shall perform the same duties and exercise the same powers with reference to the House of Correction and Reformatory as they are now, or hereafter, by law, may be authorized to perform or exercise with reference to the State Penitentiary, except in so far as such duties or powers are inconsistent with the provisions of this act."

Section 4171, M. A. S., provides:

"The members of the Board of Commissioners shall each be allowed the sum of $400.00 per annum and mileage at 10 cents per mile, for each mile traveled in the discharge of their duties, which sum shall be in addition to the sum now allowed them by law as managers of the State Penitentiary at Canon City."

Under section 1917, M. A. S., allowing officers 15 cents for each mile necessarily traveled in the serving of process, a sheriff who served process issued in different courts, at the same place, and on the same journey, is entitled to mileage in each case for the entire distance; but when an officer serves a number of writs in a case, upon a single journey, he is entitled to receive but one mileage fee.

Board of County Commissioners vs. Love, 15 Colo., 430.

Under these statutes and the foregoing opinion, I am of the opinion that the duties at the two institutions are entirely separate, and the compensation is entirely distinct, and the service is as much different in each case as the service of separate writs in the separate suits, and, therefore, the commissioners are entitled to mileage in each case, and to $400.00 salary per year for each service.

Third. Why Mr. White should draw only $300.00 a year as his salary, I am unable to say. The statute allowing $400.00 per year in the case of the Reformatory was passed in the year 1889 and has not been since amended.

Fourth. General Statute 4151, M. A. S., provides:

"The commissioners shall meet at the institution as often as once in three months, and oftener if proper control and management shall require. A majority of the members shall constitute a quorum, etc."

I, therefore, regard it a matter of discretion with the commissioners whether they shall meet each month, or not oftener than once in three months.

The facts submitted are that one of the commissioners lives at Trinidad, and charges as mileage to Canon City and return, $26.20, and $42.40 to Buena Vista and return, the one meeting following the other immediately, without any return of the commissioner to his home. In the case of another commissioner, living at Ouray, $45.75 mileage is charged to Canon City, and $39.80 to Buena Vista, under similar conditions, while the third commissioner, who resides at Denver, charges, $32.00 mileage to Canon City and $16.40 additional mileage to Buena Vista. The figures of the last commissioner do not seem to be in harmony with the charges of the other two, but the State appears to be the gainer by the difference, for, on the principle of charges by the others, the third would be entitled to his mileage from Denver to Buena Vista and return.

The pernicious evil of allowing any portion of compensation due officers to be made up from mileage is founded upon no process of reasoning or principle of justice. But we must take the legislation as we find it, and the construction of the statutes as rendered by our courts, and under these it appears that the commissioners are entitled to mileage for each service.

The general appropriation bill, with its strict clauses prohibiting mileage to the State officers generally, unless they produce a receipt for their transportation and make an affidavit that they have not traveled on a pass, is not applicable to the Commissioners of the Penitentiary or Reformatory for the reason that, by its terms, it is made to apply strictly to persons included in the appropriation bill, while the expenses and salaries of the officers and employes at the Penitentiary and Reformatory are covered by a separate appropriation bill, in which there is no prohibition against drawing mileage, and a reading of the stat-

utes first quoted appear to make mileage a part of the commissioners' compensation.

A lack of uniformity of purpose and plan in legislation appears very frequently, and there is no possibility of reconciling the differences.

Yours respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

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## WARDEN OF PENITENTIARY.

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**Where warden of Penitentiary is guilty of negligence and disobedience of orders, and convict escapes thereby, the matter should be submitted to the district attorney of the proper district for such action as he may deem proper.**

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Denver, Colo., May 19, 1903.

HON. JAMES H. PEABODY,
Governor of Colorado,
Capitol.

Dear Sir—Replying to your letter submitting the report of the Board of Penitentiary Commissioners, covering the investigation made in relation to the escape of a convict of the name of Vance, alias H. W. Lavvedder, wherein the commissioners found Warden Martin guilty of negligence and disobedience of orders, I have to say that there are two sections of our statutes which relate to the escape of convicts. These sections are 1285 and 3421 of Mills' Annotated Statutes. The first of these sections provides in substance that if the Warden of the Penitentiary shall fraudulently contrive, procure, aid, connive at, or otherwise voluntarily suffer the escape of any convict in the custody, or in said Penitentiary committed, every such person, on conviction, shall be punished by confinement in said Penitentiary for a term of not less than one year nor more than ten years.

The second of these sections provides, in substance, that, if any officer procure the escape of any convict, or connive at, or aid or procure or assist in the escape of any convict from the Penitentiary, whether such convict escape or not, he shall be guilty of a felony, and shall, upon conviction thereof, be sen-

tenced to hard labor in the Penitentiary for a term of not less than one year nor more than three years.

It seems to me, therefore, that the matter should be submitted to the district attorney of the proper district for such action as he may deem proper and necessary, and I advise that you, therefore, submit the papers to the district attorney with the request that he take immediate action thereon.

Probably, also, the Warden would be liable for the expenses incurred in the capture and return of the convict.

Respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

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## DEFAULT UNDER LEASE.

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**Land Board has power to declare forfeiture and cancel coal lease. Payment of minimum royalty does not release covenant to sink shaft. Lessees must work and develop property, so as to bring income to State. Power of board to extend lease before termination questioned. Notice of forfeiture discussed.**

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Denver, Colo., November 28, 1903.

TO THE STATE BOARD OF LAND COMMISSIONERS,
State Capitol,
Denver, Colorado.

In regard to Mineral Lease No. 511, to W. W. Carson, Joseph L. Prentiss and Robert A. Bain, dated February 1st, 1881, I would say that the principal question involved is as to the power of the board to declare a forfeiture and cancel this particular lease. This lease is what is commonly called a mining lease.

Among the special covenants of the lessees are that they shall, within a limited time, commence to sink a shaft of proper size "for the development of said lands and for the operation of the mines of coal, if any be found thereon," and that they "will proceed with all reasonable diligence in sinking the said shaft," and sink the same at least five hundred feet in depth within four years from the commencement of the term of said lease, "unless coal in merchantable quality and in quantity sufficient for the profitable working, be sooner found."

From an examination of the copy of the minutes of your board relating to this lease, submitted, I find no release of the lessees from the obligation to sink a shaft five hundred feet, and yet, although more than eighteen years have passed since the time when this covenant should have been carried out, the shaft has not been sunk.

It is also provided in said lease that your board, or its agents, may examine the property at any time during the continuance of the lease "and if, upon any such examination, it shall be found that any of the covenants in this indenture have been violated, or are being violated, or that parties of the second part are not mining for coal, and prosecuting their work in and upon said premises diligently and in faithful and miner-like manner according to the spirit and intent of their covenant herein contained, such failure or omission may be pointed out, whereupon it shall be the duty of the parties of the second part, their executors, administrators and assigns, and the parties of the second part, for themselves, their executors, administrators and assigns hereby covenant forthwith upon receiving such notice, to correct such default and to make good all such breach or breaches, and to conform their operations in the said mine to their covenants and to the best known way and manner of working like mines; Provided, that this shall not prevent the forfeiture of said lease for any breach of the covenants thereof."

Your agents appointed under the foregoing provision reported to you on October 5th, last, that "the lessees, at some remote date (evidently for the purpose of prospecting for coal), had attempted to sink a shaft and had prosecuted their work to a depth of, perhaps, one hundred feet more or less, when it was abandoned," and further state that they were informed by Dr. Prentiss, one of the lessees, that this was the only effort of the lessees to explore the coal measures.

There can be no doubt from the requirement to sink a five hundred foot shaft of the proper size for the development of said land and for the operation of the mines for coal, if any be found therein, and from the right especially reserved to declare a forfeiture in case the lessees are found not to be mining for coal, or prosecuting their work diligently, according to the spirit and intent of their covenants that the prime purpose in making this lease was to have the coal measures thoroughly developed and a source of maximum revenue to the State. Besides this, it is a principle of law, that in a mining lease, even between private parties, though there be no express covenant as to the amount of mining that shall be done, the lessee will be allowed to work or not to work the mines as he may desire, and thereby convert what was designed to bring an income to the lessor into a mere barren incumbrance upon the land, or, as one court has expressed

it, "an incubus and a manacle which would oppress and destroy the marketable value of his land."

Rover Iron Company vs. Frost, 83 Va., 397; 5 Am. St. Rep., 285, 294.

Conrad vs. Morehead, 89 No. Car., 31.

20 Am. & Eng. Enc. of Law (2d Ed.), 779-781, and cases cited.

And our own Supreme Court has said that "the right to mine having been granted, the law implies that the lessee should exercise reasonable diligence in working the mine."

See, also,

C. F. & I. Co. vs. Pryor, 25 Colo., 540, 550.

Koch's Appeal, 93 Pa. St., 434.

Petroleum Co. vs. C. C. & M. Co., 89 Tenn., 381, 389-391.

But I understand that it is contended by the lessees that so long as they pay what they call a minimum royalty, that is. a royalty upon two thousand tons of coal per year, a forfeiture of the lease for failure to develop the property can not be declared. They base their contention on the following clause: "And in each year after the first year of their said term (the lessees) will extract and hoist from said mine at least two thousand tons of merchantable coal liable to the payment of royalty as hereinafter specified, or, in default of such production, shall pay royalty upon at least that amount thereof semi-annually, in advance, on the first days of January and July in each year until the product of coal by said second party mined, shipped and sold from said premises shall exceed two thousand tons per annum, when royalty shall be paid monthly upon the monthly product as hereinafter specified."

It will be noticed that there is nothing in this provision which excuses the sinking of a shaft five hundred feet, or the continued prosecution of working the mine diligently, faithfully and in a miner-like manner, but the above quoted clause is, in effect, simply a provision that, notwithstanding their doing all these things, if they shall yet fail to produce two thousand tons of merchantable coal per year, they shall pay that royalty upon the basis of two thousand tons per year.

Moreover, it may well be, that this provision simply permits the lessees, even though merchantable coal to that extent could be mined, after the first year, to go on, if they chose to do so, with further development work, by giving them an option to do so and pay the so-called minimum royalty for failure to extract two thousand tons. The next clause following that quoted would seem to bear out this inference, because it provides that the payment of such royalty shall not excuse the lessees from

the diligent and faithful prosecution of mining said premises at any time after coal shall be found and the mines opened, etc., except upon the happening of certain contingencies not necessary to mention.

It should further be borne in mind that the Constitution of this State requires your board to provide for the sale or other disposition of the lands of the State under such regulations as may be provided by law, "and in such manner as will secure the maximum possible amount therefor."

Section 10, article IX, Colorado Constitution.

And it has always been the policy of State legislation, following out this constitutional provision, to secure the greatest possible revenue to the State from the State lands, though without any such legislation, it would be the duty of the board to so act that this would be the result.

As was said in a Pennsylvania case, "forfeiture for non-development or delay is essential to private and public interests in relation to the use and alienation of property. In such cases as this equity follows the law. In general, equity abhors a forfeiture, but not when it works equity and protects a land owner from the laches of a lessee whose lease is of no value till developed, except for a purpose foreign to the agreement."

Monroe vs. Armstrong, 96 Pa. St., 307, 310.
Brown vs. Vandergrift, 80 Pa. St., 142, 148-9.

Even though there were no forfeiture clause for the failure to perform the covenants relating to the prosecution of mining, yet it is optional with the lessor to declare a forfeiture.

20 Am. & Eng. Enc. of Law (2d Ed.), 780, and cases cited, under paragraph entitled "Forfeiture optional with lessor," in note 1.

But this lease expressly provides that your board may declare a forfeiture for non-performance by lessees.

The question of forfeiture was fully considered in my opinion to your board of March 4, last, and, although that related to cancellation of certificates of purchase, issued under the act approved April 2, 1887, yet the reasoning is applicable in many particulars to your right to declare a forfeiture in this instance.

As to the right of the board in 1896 to extend this lease, I would say that it is unnecessary for me to pass upon that question (though I have grave doubts as to the board having any such power), for your board is simply considering the lease dated February 1, 1881, which has still something over seven years to run, unless sooner terminated by forfeiture or otherwise. The notice given by your board to the lessees recently was entirely proper and reasonable.

For the foregoing reasons, I am, therefore, of the opinion that your board has the power to declare a forfeiture of the lease in question and cancel the same. I am,

Yours respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

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## POWER OF BOARD IN MATTER OF CONFLICTING LEASES.

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A lease for State lands can not be made during the continuance of a prior lease, notwithstanding any action of the register of the Land Board in attempting to do so, but where there are conflicting rights under the two leases, the parties should be required to settle the matters in the courts.

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Denver, Colo., March 13, 1903.

STATE BOARD OF LAND COMMISSIONERS,
Of the State of Colorado.

Gentlemen—I have examined the respective rights of J. F. Miller and W. W. and M. B. Porter, to the leases covering the 640 acres in section 16, township 9, range 64 west, in Elbert county, Colorado, the same being school lands.

The State Board of Land Commissioners possesses special powers and has a limited jurisdiction, but has no power to transact business except under the mode provided by the statutes.

An examination of the papers and records in this case discloses a most flagrant and outrageous disregard of this principle of law, which has no exception.

The Porter lease was executed to Mr. Lowrey on the 19th of May, 1896, and came into Mr. Porter's possession through successive assignments.

All persons dealing with the board are charged with the knowledge of the statutes of this State relating to the powers of the land board, and with the knowledge of the fact that the board can not deviate from the mode of action prescribed by law. Any attempt on the part of the board to deviate renders its action ultra vires, and absolutely void. Moreover, parties

dealing with the board are charged with such information as the records of the office contain.

The Miller lease is dated September 15, 1900, and the record shows the first payment, October 18, 1900. The Porter lease shows the last payment December 14, 1900, signed J. N. Chipley. This lease expired, by its terms, May 19, 1901, and it will be observed that the Miller lease was executed previous to its expiration.

Section 12 of Land Laws, provides:

"That the lessee shall pay the annual rental to the State Land Board, who shall receipt for the same on the lease."

Section 13 provides:

"A lease to State land shall be conditional upon the payment of rent annually in advance, and the violation of this condition shall work a forfeiture of the lease, at the option of the State Board of Land Commissioners, after thirty days' notice, to be sent to the postoffice of the lessee, as given by himself to the Register of State Lands, when the lease is issued."

Section 14:

"When any lease expires by limitation the holder thereof may renew the same in manner as follows: At any time within thirty days next preceding the expiration of the lease, the lessee, or his assign, shall notify the Register of his desire to renew such lease; if the lessee and the State Board agree as to the valuation of the land, a new lease may be issued bearing even date with the expiration of the old one."

Section 15:

"Should anyone apply to lease any of the lands belonging to the State upon which there are improvements belonging to another party, before a lease shall issue, he shall file in the office of the State Board of Land Commissioners a receipt showing that the price of said improvements, as agreed upon by the parties, or fixed by the State Board, has been paid to the owner thereof in full, or shall make such proof that he has tendered to said owner the price of said improvements so agreed upon, or fixed by said board."

It is a settled principle of law that when anything is required to be done as a condition precedent to the making of a contract, this condition must be fulfilled before the contract can be made. This requirement is contained in section 15, and is binding on both the board and the lessee, and Mr. Miller could gain no right to his lease without complying with it.

For this violation of duty by Mr. Chipley, he is not responsible, because Mr. Miller is charged with the knowledge of it, and, in my judgment, he has not even the right of action against Mr. Chipley for damages, for the reason that a court will tell him that it was his duty to know that Mr. Chipley was not acting within his authority.

Nothing appears on record or on file in the land office to show or indicate that any action was taken under the requirements of the statutes to cancel the Lowrey lease. Mr. Miller wrote a letter dated August 27, 1900, and the same month he filed his application for a lease on the same land. In it he acknowledges notice of the Porters' interest in the land. There is nothing of record or on file in the land office which shows an attempt to determine the compensation due the Porters for their improvements, in conformity with the statutes cited, and these things were necessary to be done before Miller could acquire any rights. The board was without power to make a new lease until it acted in conformity with the statutes, but I do not find that the board acted in this matter. I find that it was the Register who proceeded, and I find that his proceedings have been illegal from start to finish, and did not bind the board. Mr. Miller could acquire no rights unless he proceeded in accordance with the statutes.

There is no way of reconciling the payments made by Miller in October, 1900, and the receipts of rents by Mr. Chipley, under the Lowrey lease, December 14, 1900. It can be explained by recalling that Miller paid Mr. Chipley, in a personal letter, while the Porters paid the deputy in the usual way. So far as the board is concerned, it did not cancel the Lowrey lease. There was no declaration of forfeiture or cancellation of the lease, or any effort made to terminate it by the board. Its records are silent on the subject.

I find that since 1900 the Porters have ceased to pay rent, and that Miller has been in possession of the land and has continued his payments under a void lease.

In conclusion, I hold that the Porters have the privilege to protect their rights under the lease given them, and that Mr. Miller's lease is void.

I hold that the Land Board has nothing to do with this case, and that these parties are remitted to their rights in the courts.

If the Porters' lease is good and the improvements belong to them, and the Miller lease is void, the only way for the Porters to get possession is to go into court and begin some suitable action for possession of the land and their improvements.

It has been a ruling of the Attorney General's office for many years that it will not prosecute or defend the rights of parties under a lease or deed given them by the board, but will leave the respective parties to prosecute their own actions as they see fit.

There is no use in canceling the Miller lease, as it is plainly a void lease, and, if Miller or his assignee refuses to give possession, the only recourse the Porters have is to go to law. If there are questions of estoppel on account of the conduct of the Porters or Miller, these may also be tried out in that action.

The only controversy I see over the facts is that one party, under a void lease, is in possession, while the lessees, under the Lowrey lease, are out of possession. The court is the only tribunal that can restore them to their rights. It will serve no purpose for us to cancel the lease, for if we acted wrongly in so doing, the cancellation would amount to nothing, and in no event would it place the Porters in possession. The court alone can do this. All this board can do is to decline to recognize the Miller lease.

I, therefore, recommend that this board decide that, in the controversy between the board and J. P. Miller, that the parties be notified that this board refuses to recognize the Miller lease, and that Mr. Porter be notified to take such action at law as he may be advised to place himself in possession of the property and improvements, within sixty days, else the board will take such action in relation to the land as it may be advised.

It will be observed that the Porter lease expired May 19, 1901, and that the statutes required him to give notice within thirty days before its expiration if he desired to renew it. In regard to this I will say:

1. That it was impossible for them to secure the renewal of it, Miller being in possession of, and holding, a lease which the Register treated as good, and they have always insisted on their rights.

2. The Miller lease could not ripen into a valid lease when it was void in its inception.

3. The court will determine whether the Porters have done all that was required to secure to them the first right to a renewal of the lease.

We have spent much labor and time in endeavoring to get at the bottom of this matter, and we hope that this will finally settle the matter until some decision of the court is made in the premises.

Respecfully,

N. C. MILLER,
Attorney General.

By H. J. HERSEY,
Assistant Attorney General.

## STATE BOARD OF LAND COMMISSIONERS.

Mode of preparing patent. Requirement as to signature and seal.

Denver, Colo., September 30, 1904.

THE STATE BOARD OF LAND COMMISSIONERS,
State Capitol,
Denver, Colorado.

Gentlemen—I have your request for my opinion, which is as follows:

"Herewith is handed you Patent No. 1188, issued to Lewis C. Olmstead the 15th day of November, 1893, which is claimed to be invalid, lacking the seal and official signature of this department.

"Will you kindly advise me if such is the case and what steps are necessary to be taken to correct the same?"

In reply, I will say that the 8th General Assembly, in 1891, passed two acts relating to the manner of execution of patents for public lands.

The first of these was approved April 1st, 1891, and is found in Session Laws 1891, at pages 256-257. This act provides that:

"Whenever a purchaser of any State land has complied with all the conditions of the sale, and paid all the purchase money with lawful interest thereon, he shall receive a patent for the land purchased; such patent shall be signed by the Governor and countersigned by the Register, and attested with the seal of the State Board of Land Commissioners; and when so signed, such patent shall convey a good and sufficient title in fee simple."

The second of these acts was approved April 11, 1891, and is found in Session Laws, at page 274. Section 2 of this act provides that

"The Governor of the State shall be, and is hereby authorized, and in case of his absence or inability, the Lieutenant Governor shall be, and is hereby authorized, to execute a good and sufficient deed of conveyance, transferring in fee, without covenants, any or all lands which shall or may be ordered sold, or which shall be sold or disposed of by the State Land Board under the statutes of this State. Such deed shall be attested by the Secretary of State and have the great seal of the State thereto attached, but need not be acknowledged. The certified copy of the record of any such deed shall be receivable in evidence in all courts of record in this State, the same as the original."

These two acts are inconsistent with each other in so far as the manner of the execution of the patent is concerned. The patent submitted to me by you for my opinion is executed in accordance with the requirements of the latter of these two acts, namely, section 2 of the act approved April 11, 1891, above quoted.

In my opinion, the act approved April 11, 1891, being the later of the two acts, repeals, so far as it is inconsistent with it, the former of the two acts, namely, the act approved April 1st, 1891. And in this connection, I would call your attention to section 4 of the act approved April 11, 1891, which expressly repeals all acts and parts of acts in conflict therewith.

While repeals by implication are not favored, our Supreme Court has held in common with other courts that, of two acts of the legislative assembly on the same subject, which are repugnant to each other, the last should be regarded as repealing the first; and this is especially true when the act contains a clause repealing all acts and parts of acts inconsistent with it.

Purmort vs. Tucker L. Co., 2 Colo., 470, 472.

See, also,

Keese vs. City of Denver, 10 Colo., 112, 121-122.
Edwards vs. D. & R. G. Ry. Co., 13 Colo., 59, 64.

I am, therefore, of the opinion that Patent No. 1188, to Lewis C. Olmstead, signed by the Governor, attested by the Secretary of State, with the great seal of the State of Colorado thereto affixed, is executed in full compliance with our statute.

Yours respectfully,

N. C. MILLER,
Attorney General.

By HENRY J. HERSEY,
Assistant Attorney General.

## STATE BOARD OF HEALTH.

**Statute providing for emergency appropriation. Construction of section 3546 of the third volume of Mills' Annotated Statutes, in relation to permanent appropriation to meet emergency. Held, that this appropriation is available whenever the emergency is declared to exist, but once exhausted it is terminated.**

Denver, Colo., September 8, 1903.

HON. JOHN A. HOLMBERG,
Auditor of State,
State Capitol.

Dear Sir—The Governor has entered an order declaring that in his opinion it is necessary to draw from the general fund, on the warrant of the Auditor, a sum not to exceed $1,500 during the present fiscal year, out of the $5,000 appropriated under section 3546a of the 3d volume of Mills' Annotated Statutes.

The matter has been referred to this office for an opinion as to whether the funds are available as of the first class or otherwise.

I refer you to the opinion of Attorney General Charles C. Post, found at page 33 of the Attorney General's Report, 1901-1902, where he holds that an appropriation of $4,000 under a similar act of the Legislature is to be treated as of the first class. In this construction I agree with him, because it would be utterly useless for the Legislature to make an appropriation for an emergency and then to have it treated as of the fourth or fifth class, and thus render it unavailable in case of a deficiency in revenues.

An emergency appropriation is an appropriation made for the executive department to meet a present condition.

Further, the Legislature has the right to appropriate a given sum for the maintenance of one of the departments of the State, and then, in addition, say that a certain other sum is available for the further operation of that department in case of an emergency. The nature of the emergency provided for in this instance makes it very important that the money should be expended during periods of time when there is striking need for it.

If any of the funds belonging to the Health Department are to be paid as of the first class, in my judgment, the emergency fund is of that class.

In relation to that part of Attorney General Post's opinion in which he holds that no part of the emergency fund is to be used to defray the ordinary expenses of the Health Department, I have to say that this is clearly correct where the Legislature has made an appropriation for the continuation and operation of the department in its ordinary way. But where an emergency exists, and the declaration of this is solely a matter with the executive, as in the case under consideration, and the declaration has been made by the Governor, then the manner in which the fund can be used to prevent the introduction or spread of a particular disease dangerous to public health, is under the control of the department, and if the first expenditure is to be made to maintain the department in order to deal with the disease, then the money is properly applicable to the payment of the ordinary expenses of the board to act promptly and efficiently, and if the very existence of the board at the time is dependent upon the fund, then it is as properly applicable to the payment of its ordinary expenses as to the employment of outside help; indeed, the employment of outside help can not be made unless the board is in practical working existence.

I, therefore, see no objection to the payment of the sum of $1,500 during the present fiscal year, and the maintenance of this department as a means of preventing the spread of the epidemic threatened; and that it should be paid as of the first class.

Yours respectfully,

N. C. MILLER,
Attorney General.

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## STATE BOARD OF MEDICAL EXAMINERS.

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State Medical Board has no authority to decline to issue a certificate on the ground of immorality.

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Denver, Colo., October 24, 1903.

DR. S. D. VAN METER,
Secretary State Board of Medical Examiners,
Denver, Colo.

Dear Sir—I am in receipt of your letter of October 20, asking for an opinion on the following:

First. "As to whether we have any right, on general principle, to refuse an applicant for medical license on the ground of gross immorality or confirmed morphinism."

By reference to sections 3550 and 3556, Mills' Annotated Statutes, I am of the opinion that the board has limited authority to decline to issue a certificate on the grounds of immorality. Where the licensee has been convicted of a crime the certificate may be revoked. Where an applicant has been convicted of crime it may be refused. I do not see any other ground for refusing this certificate. It would appear necessary to convict a licensee or applicant of some crime of malpractice before a license could be revoked or refused.

Second. "Whether we can revoke a license granted upon the acceptance of affidavits subsequently found to be fraudulent."

If the affidavits were material to the granting of the license its issuance was procured by fraud, and you will have a right to revoke it.

Third. It seems that a case is pending in the district court, entitled State vs. Hagenburger, and its dismissal has been under consideration by the district attorney of the City and County of Denver and the State Board of Medical Examiners. Either body being anxious to avoid the final decision in the premises, the following resolution was passed: "Be it resolved that the board's action in the case be governed by the advice of the Attorney General."

In reference to this resolution I must say that I must decline to act. The district attorney is the one to act in this matter, and the decision of the point raised by a request for a dismissal is always founded on so many considerations that this office could not pass upon it in the abstract, and has not time to enter into the full consideration of all the matters and things that might be submitted for the purpose of forming a just judgment in the premises.

Respectfully submitted,

N. C. MILLER,
Attorney General.

By H. J. HERSEY,
Assistant Attorney General.

## TRANSFER OF INMATES FROM REFORMATORY TO STATE PENITENTIARY.

An inmate of the Reformatory can be transferred to the Penitentiary, in accordance with provision of M. A. S., 4157. Inmate, while on parole, can be prosecuted for offense committed prior to his sentence, and a parole prisoner can not be recalled while under an indictment.

M. A. S., 4157, providing for transfer to Penitentiary, should be considered constitutional.

Denver, Colo., November 20, 1903.

MR. A. C. DUTCHER,
Warden Colorado State Reformatory,
Buena Vista, Colorado.

Dear Sir—In reply to your request on the following points, I beg to say:

"1. Can an inmate of this institution be transferred to the Penitentiary by the management for any cause? If so, what?"

Persons coming within the provisions of section 4157, Mills' Annotated Statutes.

"2. Can a prisoner of this institution who is out on parole be prosecuted for an offense which was committed prior to his sentence to this institution?"

If the offense has not been outlawed under the Statute of Limitations he can be prosecuted.

"3. Under what conditions, if any, can the management of this institution take a prisoner who is out on parole, from any civil officer who has such person under arrest for some offense committed while on parole?"

The answer to question three depends upon the circumstances of each case. If he is under the control of the district court, under indictment, you can not take him away from that court. If some civil officer holds him under process, in almost every case I can conceive of you will have a right to demand him under your mittimus, but you can not interfere with the processes of the district court.

In relation to section 4157, I will state that I am of the opinion that the statute is not unconstitutional. There may be some possibility of a mistake, but I would advise you to proceed as though it were constitutional, and, if any prisoner wishes to test it, he can get the decision of the court on it. I would advise

you, in all instances, to treat the statutes as constitutional, until otherwise declared void.

Respectfully,

N. C. MILLER,
Attorney General.

By H. J. HERSEY,
Assistant Attorney General.

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## REMOVAL FROM OFFICE.

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**A member of the State Board of Health must devote his personal attention to the duties of the same, and he may be removed for incompetency, neglect of duty, or malfeasance in office, if, after a sufficient notice has been served upon him of the time of trial, the charges are found to be true.**

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Denver, Colo., December 14, 1903.

HON. JAMES H. PEABODY,
Governor of Colorado,
State Capitol.

Dear Sir—In reply to your communication of December 12, I beg leave to report as follows:

Your communication states:

"Early last spring I appointed, among other members of the State Board of Health, one Dr. E. A. Matoon, of Salida, who attended one meeting of the board, and then left the State, removing with his family to Ohio, I am informed, and has engaged in the practice of his profession in that state."

"The State Board of Health, as well as other interested parties, desire that his position on the said State Board of Health be declared vacant, and I appoint a successor to fill said vacancy."

"No person shall hold any office or employment of trust or profit under the laws of the State or any ordinance of any municipality therein, without devoting his personal attention to the duties of the same."

Article XII, section 2, Colo. Constitution.

"The Governor shall nominate, and by and with the consent of the Senate, appoint, all officers whose duties are established by this Constitution, or which may be created by law, whose appointment or election is not otherwise provided for, and may

remove any such officer for incompetency, neglect of duty or malfeasance in office."

Section 6, article IV, Colo. Constitution.

This section has been construed several times during the present administration, and you are advised that it will be necessary to serve notice upon Dr. Matoon, taking into consideration the sufficiency of such notice, in respect to time of appearance, and upon hearing, if good cause is not shown excusing the neglect of duty, clearly apparent from his protracted absence from the State, you will have a right to remove him and appoint a successor.

Respectfully,

N. C. MILLER,
Attorney General.

By H. J. HERSEY,
Assistant Attorney General.

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## POWER TO REMOVE MEMBER OF BOARD.

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**The Governor may remove a member of the Board of Managers of Industrial School for Boys, when guilty of incompetency, neglect of duty, or malfeasance in office. Excessive payment of mileage can be recovered.**

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Denver, Colo., March 16, 1903.

HON. JAMES H. PEABODY,
Governor of Colorado,
Denver, Colorado.

Dear Sir—In reply to your communication of March 11th, in relation to the report of Louis B. Schwanbeck, Special Examiner, concerning mileage and expenses of the Commissioners of the Industrial School for Boys at Golden during the last biennial period, I consider that your inquiry involves two propositions:

First. If the members of the commission are guilty of incompetency, neglect of duty, or malfeasance in office, can they be removed by the Governor?

Second. If there has been an excessive payment of mileage and an extravagant use of money for incidentals, can the misappropriation so made be recovered by suit?

In order to answer intelligently and sufficiently the first inquiry, it will be necessary to consider the statutory and con-

stitutional provisions with reference to their appointment and removal, and such decisions of the courts as may throw light upon the proper construction of such provisions.

The act establishing the State Industrial School and creating the Board of Control will be found in sections 2167-2186 of M. A. S., and section 2168 provides that:

"The general supervision and government of said Industrial School shall be vested in a Board of Control, to consist of three members, who shall be appointed by the Governor, by and with the advice and consent of the Senate during the session of the General Assembly, the members of which board shall hold their offices for the respective terms of two, four and six years from the first day of March, A. D. 1881, and until their successors shall be appointed and qualified, said respective terms of office to be designated in their several appointments; and thereafter there shall be one of said board appointed every two years, whose term of office shall continue for six years, or until his successor is appointed and qualified; and when any vacancy shall occur in said board, by the death, resignation or otherwise, the Governor shall fill the same by appointment, and the appointee shall hold only for the unexpired term of the person whose place he is appointed to fill. The members of said Board of Control shall constitute a body corporate under the name and style of the "Board of Control of the State Industrial School," with the right of suing and being sued, and of making and using a common seal, and of altering it at pleasure. A majority of the board shall constitute a quorum for the transaction of any business lawful to be done by said board."

No provision is made in this act for removal of any member of the board for any cause, but provision is made in the above quoted section for filling any vacancy which "shall occur in said board by the death, resignation or otherwise" by appointment by the Governor. For specific power, then, to remove, we must look either to a constitutional provision or to some general statute. The constitutional provision relating to removals is section 6, article 4:

"The Governor shall nominate, and by and with the consent of the Senate, appoint, all officers whose offices are established by this Constitution, or which may be created by law, and whose appointment or election is not otherwise provided for, and he may remove any such officer for incompetency, neglect of duty or malfeasance in office."

1 M. A. S., 308.

In the address to the people by the members of the Constitutional Convention, which sheds light upon the understanding of the framers of the Constitution of its meaning, it is said that in the Constitution "the Governor is given power to remove

all officers appointed by him for misconduct or malfeasance in office."

Address to the People, 1 M. A. S., page 97.

The general statutory provision relating to the power of the Governor to effect removals from office is section 1582, M. A. S., but I do not regard it, as far as this case is concerned, as anything more than a recognition by the Legislature of the constitutional power of the Governor.

Our Constitution in this respect is practically the same as the Constitution of the state of Illinois. See sections 10, 11, 12, of article 5, Illinois Constitution of 1870, quoted in full in

Wilcox vs. People, 90 Ill., 188, 189.

Section 12 of the Illinois Constitution provides that the "Governor shall have power to remove any officer whom he may appoint in case of incompetency, neglect of duty or malfeasance in office."

The Supreme Court of Illinois held that the Constitution made the power of removal from office by the Governor co-extensive with his power of appointment.

Wilcox vs. People, 90 Ill., 186, 198.

The same case also held that the Constitution giving the Governor power of removal, as aforesaid, and being silent as to the mode of its exercise, it followed that the Governor might determine whether any of the causes existed for removal from the best information he could obtain, and adopt such mode of procedure as he might deem proper and right, and that it was not for the courts to dictate to him in what manner he should perform the duty.

Our own Supreme Court has held that, under the charter of the city of Denver (which no more than the constitutional provision above referred to contains any provision as to how the Governor shall determine the sufficiency of the cause for removal, and which does not prescribe the mode of procedure), that the Governor is at liberty to adopt such mode as to him shall seem proper, without interference on the part of the courts.

Trimble vs. People, 19 Colo., 187, 198.
Throop on Public Officers, section 344.

The only question, then, would seem to be: Does the fact that the statute creating the board makes it a body corporate prevent the removal for cause by the Governor of a member of such board? In other words, is a member of such board, it being a corporation, an officer of the State within the meaning of the constitutional provision above cited?

The same question was raised in the Illinois case above cited, where the Governor removed members of a board, which board was a body corporate. In that case it was contended that members of the board were, therefore, not "officers" in any proper sense of that word, but that they were mere trustees, created a corporation by the Legislature for certain specified purposes, and that they did not belong to either of the three departments of the Government created by the Constitution. But the Supreme Court held that they did come fully within the term "officers," as their functions were essentially political and concerned the State at large, although that particular board discharged its functions as park commissioners of West Chicago, within the town of West Chicago, and that they were such officers as came within the meaning of the Constitution, and were subject to removal by the Governor under his constitutional powers.

Wilcox vs. People, 90 Ill., 186, 190, 192.

I am aware that our Court of Appeals, in the case of

Benson vs. People, 10 Colo. App., 175, 179,

has expressed doubt without deciding whether the members of the Board of the Agricultural College, which is also a body corporate under our statute, are State officers. But a person who exercises functions concerning the public, assigned to him by law, is a public officer.

Bradford vs. Justices, 33 Ga., 336.
Clark vs. Stanley, 66 N. C., 63.

Our own Supreme Court has suggested, as a definition of "State officers" those "officers whose duties relate to the State at large, or the general public, although exercised within defined limits."

People vs. Curley, 5 Colo., 412, 419.
Parks vs. S. & S. Home, 22 Colo., 96.
People vs. Goodykoontz, 22 Colo., 509.

But, in view of the definition in People vs. Curley, and other Colorado cases above cited by our Supreme Court and the Illinois case, Wilcox vs. People, supra, I am of the opinion that the members of the Board of Control of the Industrial School are State officers, within the meaning of our Constitution and statutes.

Attorney General Engley, in answering an inquiry of the Governor of this State as to whether the Governor could remove a member of the State Board of Agriculture, in closing his opinion, after citing the above section of the Constitution, says:

"The language of the constitutional provision last quoted undoubtedly confers on you the power to remove a member of the said Agricultural Board for incompetency, neglect of duty, or malfeasance in office. Some constitutional provisions necessitate the enactment of statutory laws so that the powers delegated may be given operative force. This is not a case of that kind. In this case the power is clear—the instrument certain—the Governor."

Attorney General's Report, 1893-1894, pages 29-30.

I am of the opinion, therefore, in view of the constitutional provisions and the authorities above cited, that you have full power to determine whether a member of the Board of Control of the Industrial School is guilty of incompetency, neglect of duty, or malfeasance in office, and if you find him so guilty, you have the full power of removal, and that your method of procedure is as indicated in Trimble vs. People, 19 Colo., 187.

In answer to the second proposition, I will say that there can be a recovery for excessive payment of mileage in violation of what is allowed by statute.

For the misappropriation of money there can be a recovery upon the bonds of the several members of the Board of Control.

In relation to the misappropriation, the fact that a bill has been paid without the voucher being verified does not make it a misappropriation; in addition to this deficiency of affidavit, it must be shown that the bill paid was fraudulent in some respect. If it was excessive, or if it was fraudulent in being rendered for goods which never were furnished, or if the bill was rendered for things which were not used by the School itself, but belong to the personal account of the officer or employee, then the fact that the voucher itself was irregular and unsworn to, would enable a recovery.

So far as I can learn from reading the report, complaint is made that a long list of items of a petty nature were allowed in the account of the superintendent, ranging from $200.00 to $500.00 per month, and that no voucher is furnished for these.

This is an irregularity of a dangerous character, and is in violation of law, but I presume no recovery can be had because it will likely turn out that the greater part of the articles were furnished.

But the board acted in violation of their duty when they allowed accounts in this manner, and it is for you to determine whether they were so grossly negligent of their duty as to warrant a removal.

It is undoubtedly very bad practice for any board to pay bills without proper vouchers and a verification of them. It seems to have been an evil that has grown to an enormous degree in the State departments, for the Auditor calls my attention to

the fact that most all the vouchers filed with him are unverified, and he is refusing them on that ground.

I believe this is a sufficiently full statement of the law to enable you to determine what action you can take in the premises.

Respectfully,

N. C. MILLER,
Attorney General.

By H. J. HERSEY,
Assistant Attorney General.

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## REMOVAL OF OFFICER.

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To remove member of Board of Horticulture, charges must be filed against him for neglect of duty, and notice mailed to his last postoffice address, giving reasonable time to appear at hearing.

The Board of Health has power to make its own by-laws, under which a member may be removed by a majority of the board, and upon certifying the same to the Governor the office may be declared vacant and another appointment made.

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Denver, Colo., January 11, 1904.

HON. JAMES H. PEABODY,
Governor of Colorado,
State Capitol.

Dear Sir—In reply to your request for my opinion as to what steps should be taken in the case of Mr. S. A. Smith, a member of the State Board of Horticulture and of Dr. E. A. Matoon, a member of the State Board of Health, both of whom have removed from the State and have not been present at any of the meetings of their respective boards for a long time, I would say that in the case of Mr. Smith as a member of the State Board of Horticulture, it will be necessary for charges to be filed against him for neglect of duty, setting forth his removal from the State and failure to attend meetings, etc., and that notice thereof be mailed to his last known postoffice address, giving him reasonable time to appear and answer said charges and setting the date of hearing, and after such hearing, or after his failure to appear at the time and place appointed, you will have power to remove him and appoint his successor.

In the case of Dr. Matoon, as a member of the State Board of Health, I would say that section 3545 of the third volume of

Mills' Annotated Statutes provides that the board shall have power to make by-laws and all needful rules and regulations for its own government, and that any member failing to obey said by-laws, or to comply with said rules and regulations, shall be subject to removal upon a vote of the majority of the members of said board, and that upon certification of the same to the Governor by the secretary of the board, the Governor shall declare the office vacant, and immediately fill the vacancy by the appointment of some other person.

Assuming that the State Board of Health has rules and regulations, requiring the attendance of its members upon their meetings, the board has power to declare the failure to comply with the rules because of removal, and remove Dr. Matoon, and upon the same being properly certified to you, you have power to declare the office vacant and appoint his successor.

If there are no such rules, the procedure advised as to the removal of Mr. Smith as a member of the Board of Horticulture, should be followed in this case. I am,

Yours respectfully,

N. C. MILLER,
Attorney General.

By H. J. HERSEY,
Assistant Attorney General.

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## STATE VETERINARY BOARD.

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A certificate issued by the State Veterinary Sanitary Board, for the payment for diseased horses killed, need not be signed by the Governor, but can be presented directly to the Auditor.

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Denver, Colo., April 14, 1904.

HON. JAMES H. PEABODY,
Governor of Colorado,
State Capitol.

Dear Sir—Replying to yours of the 12th inst., in reference to Certificate No. 21 of the State Veterinary Sanitary Board, dated March 23, 1896, to W. H. Snyder for $40.00, I would say that there is nothing which requires your signature.

Upon presentation of the certificate to the Auditor, the Auditor will, under a recent decision of the District Court, in the case of W. C. Bradbury vs. John A. Holmberg, as Auditor, etc., in which a like certificate was involved, be required to draw

his warrant. But the Auditor's warrant will be drawn in favor of W. H. Snyder, who will have to present the same and receipt for the warrant, and who can then endorse the warrant to whomsoever he sees fit.

The certificate and attached papers are herewith returned. I am,

Yours very respectfully,

N. C. MILLER,
Attorney General.

By H. J. HERSEY,
Assistant Attorney General.

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## ENCUMBERING STATE LANDS.

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**Regents of the State University have no authority to encumber its lands for the purpose of obtaining irrigation.**

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Denver, Colo., October 24, 1903.

REGENTS OF THE STATE UNIVERSITY,
Boulder, Colorado.

Gentlemen—I am in receipt of a communication from Mr. D. M. Richards of your board, asking my opinion as to the power of the board in relation to the following matters:

"The University is the owner of certain lands granted by Congress for its use. Some of these lands are now located in certain timber reserves, and it is proposed to exchange them for other land on a proposition submitted by the general government."

"We have examined lands to be selected in lieu of those contained in the timber reserves, and such lands are under ditches built under the act of 1901, concerning irrigation districts. In order to avail ourselves of the benefit of these ditches, it will be necessary to go into the plan devised by the act of 1901, allowing the issuance of bonds in irrigation districts. These bonds become a lien upon all lands included within the district."

"The promoters of the ditch want the Regents of the University to agree to pay the share of the University in the irrigation district; for instance, in one district, it is claimed that the bonds will amount to about $10 per acre."

"We wish to know whether the University has any power to pledge the funds of the State or to create a lien upon the

land, so that in case the bonds issued against that particular district would be a lien upon the land belonging to the University in that district."

I refer you to article XI, section 3, of the Constitution. The constitutional provision provides that the State shall not contract any debt by loan in any form, except to provide for casual deficiencies of revenues, suppress insurrection, * * *

"No bill shall be passed granting any extra compensation to any public officer, servant or employe, agent or contractor, after services shall have been rendered, or contract made; nor providing for the payment of any claim made against the State without previous authority of law."

Section 28, article V, Constitution.

Reference is made to sections 4112, 4114, 4116, Mills' Annotated Statutes. These sections prohibit the Board of Regents from creating any debt in excess of appropriation.

Reference is also made to the Enabling Act, and the grant of the said State lands to Colorado for the University.

It will be seen by reference to the grant that these lands are to be held in trust for the benefit of the University, and that they must not be encumbered, and if sold the principal must remain intact for the purpose of applying the interest to the benefit of the University. If the lands are retained they must be cared for in such manner that the profits only will be used for the benefit of the University.

I need not refer to the various opinions of this office and of the Supreme Court on this proposition. They are familiar to you.

Therefore, it is beyond the power of the Legislature to pass a law that will allow this land to be encumbered with any lien, and the only plan upon which they may participate in the benefit of the Act of 1901, relating to irrigation districts, is upon a cash basis. The Legislature must make an appropriation which would enable them to participate in the irrigation ditch built by a district. By paying cash the benefits of the ditch may be secured for the land. Without an appropriation for this purpose, the board is powerless to do anything.

The possibility of obtaining revenue in the general fund to enable the Legislature to make an appropriation for this purpose is not very flattering. All our State institutions are clamoring for more money, and the increase of revenue is not sufficient to meet the growing demand. But this is a matter for the Legislature to deal with.

However, I wish to emphasize, as a member of the Land Board, the fact that the constant and continued appropriation of water must ultimately make it very difficult to secure water rights for our State lands. While there has always been a cry

that the water would be finally taken up, and the end has not yet come, yet it must be admitted that the opportunity for getting water is growing less and less every year. The only plan that is apparent, in my judgment, of securing water rights for our State lands or school lands, if they are to be retained, is through appropriation, and these appropriations must be made with sufficient caution that the money will be available.

On the other hand, it is stated that by very long leases private individuals will secure the water rights. Of course, they can not do so by encumbering the State lands or school lands; and I do not presume that a leasehold interest in these lands would be a sufficient basis upon which loans could be made. Leases of these lands are subject to too many conditions within the control of the Board of State Land Commissioners.

The matter is a very grave one, which your request for an opinion presents, and it should receive the careful consideration of our Legislature, the friends of the University and the patrons of the public schools of the State. Your request for an opinion presents difficulties which exist in a most forcible manner, and I have referred to them in order that the matter might be brought to the attention of your Board of Regents.

Respectfully submitted,

N. C. MILLER,
Attorney General.

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